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v.
Reshat Shabani

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Counsel for petitioner: Solicitor General

Counsel for respondent: Caplan,Alan M.

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2	Jan 12 1994		Brief of respondent Reshat Shabani in opposition filed.
3	Jan 24 1994		Reply brief of petitioner filed.
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5	Feb 22 1994		Petition GRANTED.
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6	Apr 8 1994		Joint appendix filed.
7	Apr 8 1994		Brief of petitioner United States filed.
9	Apr 21 1994		Order extending time to file brief of respondent on the merits until June 16, 1994.
10	Jun 16 1994		Brief of respondent Reshat Shabani filed.
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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 993 F.2d 1419.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1993. A petition for rehearing was denied on September 22, 1993. App., *infra*, 10a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 846 of Title 21 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, respondent was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to 160 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. App., *infra*, 1a-9a.

1. On August 29, 1990, a federal grand jury in the District of Alaska returned a one-count indictment charging that between March 7 and March 25, 1990, respondent conspired with Pamela Mayfield, Dzemail Pinjoli, and others to distribute cocaine. C.A. Supp. Excerpt of Record 1-2.[1] The indictment did not allege that any overt act had been committed in furtherance of the conspiracy. App., *infra*, 2a. Before trial, respondent moved to dismiss the indictment on the ground that the government was

[1] Separate indictments were returned charging Mayfield and Pinjoli with drug trafficking offenses and carrying a firearm during and in relation to a drug trafficking offense. Mayfield pleaded guilty to the charges and testified at respondent's trial pursuant to a plea agreement. After a trial on the charges against him, Pinjoli was convicted of distributing cocaine but acquitted on the firearm charge. Gov't C.A. Br. 7-8 & n.4.

required to allege the commission of an overt act. *Ibid.* The district court denied the motion. *Ibid.*

The evidence at respondent's trial showed that in March 1990, respondent arranged for three shipments of cocaine, totaling approximately five kilograms, to be brought from California to Anchorage, Alaska. Upon the arrival of each shipment, respondent worked together with Mayfield and Pinjoli to separate the cocaine into smaller quantities, which they sold to Mayfield's friends and acquaintances, among others. Respondent, Mayfield, and Pinjoli divided the proceeds of the sales. Gov't C.A. Br. 2-8.

At the close of the evidence, respondent asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that an overt act had been committed in furtherance of the conspiracy. App., *infra*, 3a. The court declined to give that instruction. *Ibid.*[2]

[2] The district court's instruction to the jury on the elements of 21 U.S.C. 846 was as follows (C.A. Supp. Excerpts of Record 1-2):

> The defendant is charged in the indictment with conspiring to distribute cocaine in violation of Title 21, United States Code, Section 846. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> *First*: beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, there was an agreement between two or more persons to distribute cocaine in violation of 21 U.S.C. § 841(a)(1); and
>
> *Second*: the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

2. The court of appeals reversed respondent's conviction. App., *infra*, 1a-9a. It held, first, that the district court erred in failing to instruct the jury that the government was required to prove an overt act in furtherance of the conspiracy. In so holding, the court of appeals emphasized that it was "bound by [the Ninth Circuit's] previous decisions," which the court read to require the government in a prosecution under 21 U.S.C. 846 to prove an overt act in furtherance of the conspiracy at trial, even though the government is not required to allege an overt act in the indictment. App., *infra*, 5a. The court "s[aw] merit," however, "in the government's argument that [the Ninth Circuit's] recent cases requiring proof of an overt act stand on weak ground." *Id.* at 4a. The court explained that "[t]he omission of overt act language from the text of 21 U.S.C. § 846 suggests that Congress * * * established a distinct definition of conspiracy for narcotics crimes, one that does not require an overt act." App., *infra*, 4a. Moreover, the court observed that in construing other conspiracy statutes that contain no express overt act requirement, the Ninth Circuit "ha[s] held that proof of an overt act is unnecessary." *Ibid.* The court added: "So has the Supreme Court." *Ibid.*, citing *Singer* v. *United States*, 323 U.S. 338 (1945). In addition, the court of appeals recognized that "every other circuit holds that proof of an overt act is not necessary" in a prosecution under Section 846. App., *infra*, 4a; see also *id.* at 4a n.1 (citing cases).

The court of appeals acknowledged that "[t]he jurors heard testimony about overt acts." App., *infra*, 7a. It determined, however, that because respondent was charged only with drug conspiracy, and not with any substantive drug offenses, "the

jurors did not have to find an overt act or its functional equivalent." *Id.* at 8a. The court therefore concluded that the district court's failure to instruct on the overt act requirement was not harmless error.[3]

Chief Judge Wallace concurred in a separate opinion. App., *infra*, 9a. He observed that there is "a complete lack of textual support" in 21 U.S.C. 846 for requiring proof of an overt act. App., *infra*, 9a. He urged the Ninth Circuit to "take this issue en banc and to align itself with every other court of appeals." *Ibid.*

3. The government filed a petition for rehearing with a suggestion of rehearing en banc. The petition was denied, with only Judge Wallace voting in favor of rehearing en banc. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit plainly erred in holding that the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act in furtherance of the conspiracy. That holding cannot be squared with the text of the statute, which contains no overt act requirement. Moreover, the holding conflicts with decisions of this Court holding that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act. Finally, the decision in this case conflicts with decisions of 11 other circuits holding that 21 U.S.C. 846 does not require proof of an overt act. This Court's review is warranted.

1. a. The Ninth Circuit's holding is at odds with the plain language of the drug conspiracy statute,

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[3] We do not seek further review of the court of appeals' holding regarding harmless error.

21 U.S.C. 846. The statute provides in pertinent part that "[a]ny person who * * * conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." As the Ninth Circuit observed in this case, "[t]he plain language of 21 U.S.C. § 846, in contrast to the general conspiracy statute, 18 U.S.C. § 371, does not mention an overt act." App., *infra*, 4a.[4] Thus, as Chief Judge Wallace observed in his concurring opinion in this case, there is a "complete lack of textual support in the statute" for the Ninth Circuit's holding that 21 U.S.C. 846 requires proof of an overt act in furtherance of the conspiracy. App., *infra*, 9a. See also *United States* v. *Felix*, 112 S. Ct. 1377, 1386 (1992) (Stevens, J., concurring) ("there is no overt act requirement in the federal drug conspiracy statute").

The absence of an express overt act requirement in the drug conspiracy statute is dispositive of the question whether the government must prove an overt

[4] The general conspiracy statute, 18 U.S.C. 371, provides in pertinent part (emphasis added):

> If two or more persons conspire * * * to commit any offense against the United States, * * * *and one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Congress first enacted a general conspiracy statute in 1867; it was codified as Section 5440 of the Revised Statutes (1873-1874) and later as Section 37 of the Criminal Code. Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096. The language of the early versions of the general conspiracy statute is substantially identical to the language of the current version codified at 18 U.S.C. 371.

act in prosecutions under that statute. The answer is no. As this Court has repeatedly stated, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). The plain language of Section 846 shows that proof of an overt act is not required in prosecutions under that provision.

b. The Ninth Circuit's holding also conflicts with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913). Those decisions make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act.

In *Nash*, the Court rejected a defendant's claim that an indictment charging conspiracies to violate the Sherman Act was invalid because "no overt act is laid." 229 U.S. at 378. The answer to that claim, the Court stated, "is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." *Ibid.* The Sherman Act did not contain an express overt act requirement. The Court in *Nash* accordingly distinguished its decisions construing the general conspiracy statute, which did contain an express overt act requirement. Decisions interpreting the general conspiracy statute, the Court explained, "have no bearing upon a statute that does not contain [an overt act] requirement." *Ibid.*[5]

[5] In decisions arising under the predecessors to Section 371, the Court made clear that courts may require proof of an

The question in *Singer* was whether an indictment charging the defendant with conspiring to evade the draft was sufficient in the absence of an allegation of an overt act. 323 U.S. at 339. The answer to that question depended on whether the conspiracy was punishable under Section 11 of the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 894-895, which did not contain an express overt act requirement, or was instead punishable only under the general criminal conspiracy statute (a predecessor of 18 U.S.C. 371), which did contain an express overt act requirement. 323 U.S. at 339-340. The Court held that the offense was punishable under Section 11 and that the indictment was therefore sufficient despite the absence of an allegation of an overt act. In so holding, the Court observed that Section 11 "does not require an overt act for the offense of conspiracy." *Id.* at 340.

Thus, as the Seventh Circuit recently stated, "*Nash* and *Singer* gave Congress a formulary: by choosing a text modeled on § 371, it gets an overt act require-

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overt act only under statutes that contain an express overt act requirement, because that requirement is in derogation of the common law. In *Hyde* v. *United States*, 225 U.S. 347, 359 (1912), for example, the Court explained that "at common law it was not necessary to aver or prove an overt act; but § 5440 [a predecessor to Section 371] has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object." See also, *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable" under the general conspiracy statute); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905).

ment; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 113 S. Ct. 509 (1992). Under *Nash* and *Singer*, because Section 846 does not contain an express overt act requirement, it does not require proof of an overt act.

c. In addition to conflicting with the plain language of Section 846 and with this Court's decisions in *Nash* and *Singer*, the Ninth Circuit's decision violates the well-established principle that statutes must be construed to adopt the common law meaning of legal terms unless a contrary purpose is evident. See, *e.g.*, *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991).[6] As the Court recognized in *Nash* and *Singer*, a common law conspiracy did not require proof of an overt act. *Nash*, 229 U.S. at 378; *Singer*, 323 U.S. at 340.[7] Congress's omission of an express overt act requirement from Section 846 thus provides compelling evidence that it intended to punish drug conspiracies

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[6] See also *Moskal* v. *United States*, 498 U.S. 103, 114 (1990); *United States* v. *Turley*, 352 U.S. 407, 411 (1957)); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

[7] See also *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *Hyde* v. *United States*, 225 U.S. at 359; *Hyde* v. *Shine*, 199 U.S. at 76; *Bannon & Mulkey* v. *United States*, 156 U.S. 464, 468 (1895); *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879); *United States* v. *Walsh*, 28 F. Cas. 394, 395 (E.D. Mo. 1878) (No. 16,636); 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.5(c), at 93-94 (1986); *Developments in the Law —Criminal Conspiracy*, 72 Harv. L. Rev. 920, 923 (1959); B.F. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 338 (1947).

"on the common law footing." *Singer*, 323 U.S. at 340 (quoting *Nash*, 229 U.S. at 378).

There is no contrary evidence in the legislative history of Section 846 or earlier statutes proscribing drug conspiracies. The earliest provision proscribing drug conspiracies was enacted in 1951, in a provision concerning conspiracies to traffic in narcotic drugs. See Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 767. A similar provision proscribing conspiracies to traffic in marijuana was enacted in 1956. Act of July 18, 1956, ch. 629, Tit. I, § 106, 70 Stat. 570. Neither of those provisions, codified as 21 U.S.C. 174 and 176a (1958), contained an express overt act requirement. Moreover, nothing in the legislative history of those provisions suggested that Congress intended to require proof of an overt act. Courts interpreting those provisions accordingly held that no such proof was required. See *United States* v. *Gardner*, 202 F. Supp. 256, 258-259 (N.D. Cal. 1962); see also *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (9th Cir. 1967) (adopting the reasoning in *Gardner*); *United States* v. *Garfoli*, 324 F.2d 909, 910 (7th Cir. 1963).

The current drug conspiracy statute, 21 U.S.C. 846, was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 406, 84 Stat. 1265. The legislative history of the new statute contained no suggestion that Congress intended to adopt an overt act requirement for drug conspiracies that was absent in the predecessor statute. And the purpose of the 1970 legislation—to enhance the tools for prosecuting serious drug offenses—would be contrary to an unspoken intention to add a new element to the drug conspiracy

offense. See *United States* v. *Bey*, 736 F.2d 891, 894 (3d Cir. 1984); *United States* v. *De Viteri*, 350 F. Supp. 550, 552 (E.D.N.Y. 1972); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 948-949 (1959) ("There seems little reason to require proof of a substantial overt act in * * * any conspiracy to trade in narcotics."). The Ninth Circuit thus departed from both the common law of conspiracy and the prevailing rule under the predecessor drug conspiracy statutes, without any support in the text, the legislative history, or the purposes of Section 846.

d. The Ninth Circuit's decision rests, ultimately, on a misreading of two of this Court's precedents. In a case dealing with the predecessor to Section 846, the Ninth Circuit stated in passing that the statute required proof of an overt act. See *United States* v. *Thompson*, 493 F.2d 305, 310, cert. denied, 419 U.S. 834 (1974). For that proposition, the court cited *United States* v. *Rabinowich*, 238 U.S. 78 (1915). *Rabinowich*, however, did not support the court's construction of the drug conspiracy statute.

Rabinowich concerned Section 5440 of the Revised Statutes (1873-1974), a predecessor of 18 U.S.C. 371. As noted, the Court in *Nash* stated that decisions interpreting Section 5540 "have no bearing upon a statute that does not contain the [overt act] requirement found in [Section 5440]." 229 U.S. at 378. The Court in *Singer* similarly indicated that decisions construing Section 5440 do not guide the interpretation of statutes that do not contain an express overt act requirement. The Court in *Singer* cited *Rabinowich* for the proposition that proof of an overt act was required if the offense was punish-

able under Section 37 of the Criminal Code (an immediate predecessor of Section 371), which did contain an express overt act requirement, see *Singer*, 323 U.S. at 340, but it cited *Nash* for the proposition that proof of an overt act was not required if the offense was punishable instead under a statute that did not contain an express overt act requirement, see *Singer*, 323 U.S. at 340. Thus, *Nash* and *Singer* make clear that *Rabinowich* is inapplicable to statutes, such as 21 U.S.C. 846, that do not contain an express overt act requirement.

The Ninth Circuit made a similar error in *United States* v. *Monroe*, 552 F.2d 860, 864, cert. denied, 431 U.S. 972 (1977). There, the court cited *United States* v. *Feola*, 420 U.S. 671 (1975), in support of the proposition that Section 846 requires proof of an overt act. Like *Rabinowich*, however, *Feola* involved the general conspiracy statute, not Section 846 or any other conspiracy statute that lacks an express overt act requirement.

In each case, the reference to the overt act requirement appears to have been the product of an assumption that the law of conspiracy is consistent throughout, and a lack of attention to the differences among conspiracy statutes. Certainly there is no basis in the decisions of this Court on which the Ninth Circuit relied to support the rule it has adopted with respect to Section 846; in sum, the Ninth Circuit significantly understated the matter when it characterized its prior decisions construing Section 846 to require proof of an overt act as resting on "weak ground." App., *infra*, 4a.

2. The Ninth Circuit's error calls for correction by this Court for three reasons.

First, the Ninth Circuit's decision conflicts with the governing rule in 11 other circuits. As the Ninth Circuit itself recognized (App., *infra*, 4a), every circuit with criminal jurisdiction except the Ninth Circuit has held that 21 U.S.C. 846 does not require proof of an overt act.[8] The other circuits have adopted that rule as the necessary logical extension of *Nash* and *Singer*. See, *e.g.*, *United States* v. *Sassi*, 966 F.2d 283, 285 (7th Cir.), cert. denied,

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[8] See, *e.g.*, *United States* v. *Pumphrey*, 831 F.2d 307, 308-309 (D.C. Cir. 1987); *United States* v. *Paiva*, 892 F.2d 148, 155 (1st Cir. 1989); *United States* v. *Knuckles*, 581 F.2d 305, 311 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Bey*, 736 F.2d at 895; *United States* v. *Dreyer*, 533 F.2d 112, 117 (3d Cir. 1976); *United States* v. *Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States* v. *Onick*, 889 F.2d 1425, 1432 (5th Cir. 1989); *United States* v. *Brown*, 692 F.2d 345, 348 (5th Cir. 1982); *Cacace* v. *United States*, 590 F.2d 1339, 1340 (5th Cir. 1979) (per curiam) (habeas case); *United States* v. *Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States* v. *Dempsey*, 733 F.2d 392, 394-396 (6th Cir.), cert. denied, 469 U.S. 983 (1984); *United States* v. *Sassi*, 966 F.2d at 284-285; *United States* v. *Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986); *United States* v. *Figueroa*, 900 F.2d 1211, 1218 (8th Cir.), cert. denied, 496 U.S. 942 (1990); *United States* v. *Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, 488 U.S. 836 (1988); *United States* v. *Alberti*, 727 F.2d 1055, 1060 (11th Cir.), cert. denied, 469 U.S. 852 (1984); *United States* v. *Cochran*, 883 F.2d 1012, 1017 (11th Cir. 1989); *United States* v. *Noe*, 821 F.2d 604, 609 n.7 (11th Cir. 1987). On occasion, some courts of appeals have suggested in passing that proof of an overt act is an element of Section 846. See, *e.g.*, *United States* v. *Gonzalez*, 810 F.2d 1538, 1544 (11th Cir. 1987); *United States* v. *Hutchinson*, 488 F.2d 484, 490 (8th Cir. 1973), cert. denied, 417 U.S. 915 (1974). But in every case in which a court of appeals has given plenary consideration to the issue, it has concluded that the statute contains no such requirement.

113 S. Ct. 509 (1992); *United States* v. *Covos*, 872 F.2d 805, 810 (8th Cir.), cert. denied, 493 U.S. 840 (1989); *United States* v. *Pumphrey*, 831 F.2d 307, 309 (D.C. Cir. 1987); *United States* v. *Bey*, 736 F.2d 891, 894 (3d Cir. 1984); *United States* v. *Dempsey*, 733 F.2d 392, 395 (6th Cir.), cert. denied, 469 U.S. 983 (1984).

Second, the question presented here is an important and recurring one. The question whether proof of an overt act is required under 21 U.S.C. 846 arises in every trial under that statute. Moreover, the Ninth Circuit's analysis, if applied beyond the immediate setting of Section 846, would call into question the construction of a large number of important criminal conspiracy statutes that contain no express overt act requirement.[9] Those statutes include the civil rights conspiracy statute, 18 U.S.C. 241; the false claims conspiracy statute, 18 U.S.C. 286; the extortionate extension of credit statutes, 18 U.S.C. 892 and 894; the Hobbs Act, 18 U.S.C. 1951; the RICO conspiracy statute, 18 U.S.C. 1962(d); the drug importation conspiracy statute, 21 U.S.C. 963; the voting rights conspiracy statutes, 42 U.S.C. 1973i(c) and 1973j(c); and the maritime drug conspiracy statute, 46 U.S.C. App. 1903(j). Accordingly, this Court's review is necessary not only to bring consistency to the construction of Section 846, but to settle any doubts that the Ninth Circuit's analysis may raise about the proper construction of the large number of similar conspiracy statutes in the United States Code.

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[9] Of the more than 80 federal criminal conspiracy statutes, only 21 contain an express overt act requirement.

Finally, the Ninth Circuit has made clear that it will not correct its own error. Both the majority and the concurring opinions below criticized the Ninth Circuit's position that 21 U.S.C. 846 requires proof of an overt act. See pp. 4-5, *supra*. In addition, the majority recognized that the Ninth Circuit's position conflicts with decisions in every other circuit and cannot be reconciled with some of the Ninth Circuit's own decisions on closely related statutes.[10] In his concurring opinion, moreover, Chief Judge Wallace urged the full court "to take this issue en banc and to align itself with every other court of appeals." App., *infra*, 9a. Under these circumstances, the Ninth Circuit's denial of en banc review, with only Chief Judge Wallace dissenting, indicates that review by this Court is necessary to correct the Ninth Circuit's error.

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[10] In three decisions interpreting the predecessor statutes to Section 846, the Ninth Circuit stated that the drug conspiracy statute did not require proof of an overt act. See *Hopkins* v. *United States*, 405 F.2d 770, 772 n.2 (9th Cir. 1969); *Ewing* v. *United States*, 386 F.2d 10, 15 (9th Cir. 1967), cert. denied, 390 U.S. 991 (1968); *Leyvas* v. *United States*, 371 F.2d 714, 717 (9th Cir. 1967). And the Ninth Circuit has refused to read an overt act requirement into 18 U.S.C. 241, the civil rights conspiracy statute, even though that statute, like Section 846, contains no express overt act requirement. See *United States* v. *Skillman*, 922 F.2d 1370, 1375-1376 (9th Cir. 1990), cert. dismissed, 112 S. Ct. 353 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 91-30224

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, a/k/a LEE SHABANI,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted Dec. 8, 1992
Decided May 17, 1993

Before: WALLACE, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

Shabani appeals his conviction of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He argues that the government failed to plead or prove

an essential element of the crime. The indictment did not allege that an overt act was committed to further the conspiracy. In defining the offense, the jury instructions also omitted mention of an overt act. We conclude that the indictment was legally sufficient but hold that the district court erred in not instructing the jury on the requirement of an overt act. The jury was precluded from finding all the elements necessary to convict. We must reverse.

I

The government alleged that Shabani moved to Alaska and entered into a drug distribution scheme with his girlfriend, her family and their associates. According to the prosecution, Shabani was the supplier arranging to have the cocaine brought to Anchorage from California. The girlfriend, Mayfield, and another friend, Pinjoli, handled the distribution, making many of the sales to Mayfield's relatives. FBI agents purchased drugs from the coconspirators during an undercover investigation. Mayfield pleaded guilty and agreed to cooperate with the prosecution.

Shabani stood trial alone, charged with conspiracy to distribute cocaine. He moved to dismiss the indictment for failing to allege an essential element of the crime, the commission of an overt act. The district court denied the motion.

His defense at trial focused on the lack of direct evidence linking him to any of the drug sales. The major witnesses included Mayfield and her relatives, all of whom testified pursuant to plea agreements. Shabani suggested that they had concocted a story about his involvement to gain lenient treatment from the federal prosecutor.

Before the case went to the jury, Shabani again raised the overt act issue, requesting that the court modify the jury instructions to mention that proof of an overt act was necessary to convict. The court declined to do so. The jury returned a guilty verdict. The court sentenced Shabani to 160 months imprisonment, followed by a 60-month term of supervised release unless deported.

II

A. Failure to include overt act in the indictment

The parties alert us to an apparent conflict in this circuit as to whether an overt act must be proved or alleged to sustain a drug conspiracy conviction. Our recent cases restate consistently that proof of a Section 846 violation requires (1) an agreement, (2) to engage in criminal activity, and (3) one or more overt acts in furtherance of the conspiracy. *See, e.g., United States v. Garza*, 980 F.2d 546, 554 (9th Cir. 1992); *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir.1992); *United States v. Vasquez-Chan*, 978 F.2d 546, 553 (9th Cir.1992); *United States v. Smith*, 924 F.2d 889, 894 n. 1 (9th Cir.1991); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir.1990). The Ninth Circuit Model Jury Instructions also mention an overt act as one of the elements. Ninth Cir.Crim.Jury Inst., 8.05A.

Yet, language in *United States v. McCown*, 711 F.2d 1441 (9th Cir.1983) and *United States v. Tavelman*, 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1429, 71 L.Ed.2d 649 (1982), suggests that

> [a]n indictment under 21 U.S.C. § 846 is sufficient if it alleges: a conspiracy to distribute

> drugs, the time during which the conspiracy was operative and the statute allegedly violated, *even if it fails to allege or prove any specific overt act in furtherance of the conspiracy.* (emphasis added)

McCown, id. at 1450 (quoting *Tavelman, id.* at 1137).

We see merit in the government's argument that our recent cases requiring proof of an overt act stand on weak ground. The plain language of 21 U.S.C. § 846, in contrast to the general conspiracy statute, 18 U.S.C. § 371, does not mention an overt act. When we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of an overt act is unnecessary. *See, e.g., United States v. Skillman*, 922 F.2d 1370, 1375 (9th Cir.1990) (conspiracy to deprive another of civil rights in violation of 18 U.S.C. § 241), *cert. dismissed*, —— U.S. ——, 112 S.Ct. 353, 116 L.Ed.2d 275 (1991). So has the Supreme Court. *See, e.g., Singer v. United States*, 323 U.S. 338, 65 S.Ct. 282, 89 L.Ed. 285 (1945) (Selective Service Act).

The omission of overt act language from the text of 21 U.S.C. § 846 suggests that Congress, in enacting the Controlled Substances Act, established a distinct definition of conspiracy for narcotics crimes, one that does not require an overt act. *See United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir. 1987). For these reasons, every other circuit holds that proof of an overt act is not necessary.[1]

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[1] *See United States v. Sassi*, 966 F.2d 283, 285 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 509, 121 L.Ed.2d 444 (1992); *United States v. Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States v. Covos*, 872 F.2d 805, 810 (8th Cir.), *cert. denied*, 493 U.S. 840, 110 S.Ct. 124, 107 L.Ed.2d 85 (1989); *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), *cert. denied*, 488 U.S. 836, 109 S.Ct. 99, 102 L.Ed.2d 74 (1988); *United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir. 1987); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984); *United States v. Alberti*, 727 F.2d 1055, 1060 (11th Cir.), *cert. denied*, 469 U.S. 862, 105 S.Ct. 199, 83 L.Ed.2d 131 (1984); *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981); *United States v. Knuckles*, 581 F.2d 305, 311 (2d Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *United States v. DeJesus*, 520 F.2d 298, 301 (1st Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 126, 46 L.Ed.2d 94 (1975).

Clearly, the district court believed that this circuit should abandon its minority approach. In declining to follow the authority requiring proof of an overt act, Judge Holland made a fair attempt at resolving our confusing circuit law. He reached this decision "with considerable reluctance and a lot of caution," inviting counsel to appeal so that we might review the question thoroughly.

We understand the district court's frustration with seemingly contradictory opinions, as well as its desire to avoid a conflict with persuasive authority from all the other circuits. Nevertheless, as a three-judge panel, we are bound by this court's previous decisions. *United States v. Washington*, 872 F.2d 874, 880 (9th Cir.1989). We must attempt to resolve the tension in our case law. Only if the cases prove irreconcilable must we call for en banc review. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir.1992) (en banc), *cert. denied*, —— U.S. ——, 113 S.Ct. 1429, 122 L.Ed.2d 797 (1993).

We do not believe that *McCown* controls the issue we must decide today. In *McCown*, the appellants challenged that an indictment was defective because

it "fail[ed] to state with specificity the time during which the conspiracy was operative." 711 F.2d at 1450. We ruled that the indictment gave sufficiently specific beginning and ending dates. The overt act issue played no part in *McCown's* central holding. The language that it was unnecessary to include an overt act in the indictment was dictum that we need not follow.[2]

The issue of overt acts played a more critical part in *Tavelman*. The appellants directly challenged their indictments as constitutionally defective because of failure "to allege specific facts or overt acts." 650 F.2d at 1137. They were indicted on two counts. Count One alleged a cocaine conspiracy. Count Two alleged that the appellants violated the Travel Act by performing interstate acts in furtherance of the intent to distribute cocaine. We held that the indictments were sufficient even though they failed to allege an overt act for the conspiracy charge.

A narrow reading of the case suggests that this was because Count Two supplied the missing overt act. The appellants had conceded that "the existence of a substantive count may substitute for a definite statement fo essential facts or overt acts." *Id.* Yet *Tavelman* indicated no such restrictions on its holding. It relied on the general proposition that "[c]ourts do not require as detailed a statement of an offense's elements under a conspiracy count as under a substantive count." *Id.* Its statement about indictments being sufficient even though omitting overt acts sweeps broadly.

[2] Indeed, we are puzzled by how the court arrived at this conclusion. Both *McCown* and *Tavelman* cite to an out-of-circuit case, *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978), *overruled on other grounds, United States v. Rodriguez*, 612 F.2d 906 (5th Cir. 1980) (en banc), *aff'd*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), for the proposition that the indictment need not allege an overt act. But the basis for *Marable's* holding was that the Fifth Circuit, in contrast to this court, does not require that the government even prove an overt act at trial. *Id.*

This does not mean, however, that *Tavelman* conflicts irreconcilably with our other line of cases. It addresses only what the government must allege in an indictment, not what must be proved at trial. Our other cases hold clearly that the government must demonstrate the commission of an overt act to sustain a conviction. We conclude that *Tavelman* excuses any deficiencies in the indictment at issue here.

B. Failure to Instruct on an Overt Act

We review de novo whether the district court's instructions to the jury misstated the elements of a statutory crime. *Garza*, 980 F.2d at 554. Jury instructions omitting an element of the offense are constitutional error. *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir.1991).

The court erred in declining to modify the jury instructions to include an overt act. As we have indicated, our cases hold clearly that the government must prove this element to sustain a conviction. The jurors heard testimony about overt acts. Witnesses said that Shabani drove a truck at least twice to accept drug deliveries. But the jurors did not necessarily have to rely on this evidence to convict of conspiracy as defined in the jury instructions.

We decline to speculate about how the jury might have weighed this evidence if properly instructed. As a result, we cannot say that the instructional error was harmless. To find harmless error, we would have

to conclude that "no rational jury could have made [its] findings without also finding the omitted or presumed fact to be true." *Id.* at 425. We have deemed omission of the overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act. *See United States v. Garcia*, 988 F.2d 965, 969 (9th Cir.1993); *United States v. Baldwin*, 987 F.2d 1432, 1439 (9th Cir. 1993); *Garza*, 980 F.2d at 554; *United States v. Harrison-Philpot*, 978 F.2d 1520, 1522 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 2392, 124 L.Ed.2d 294 (1993). Yet Shabani's conviction rested on the single conspiracy count. As the case was submitted to them, the jurors did not have to find an overt act or its functional equivalent. They were precluded from finding an element necessary to convict.

III

Because we find instructional error, we do not reach the sufficiency of the evidence, nor do we address the other issues raised on appeal. We conclude that the district court's failure to instruct on an overt act prevented the jury from finding an element necessary to convict Shabani of conspiracy under 21 U.S.C. § 846. We reverse and remand.

REVERSED AND REMANDED.

WALLACE, Chief Judge, concurring:

In light of our holding that the indictment in this case was sufficient despite failing to allege an overt act, our conclusion that the district court erred in failing to instruct the jury that the government was required to prove the commission of an overt act may seem rather odd. Indeed, I am aware of no other circumstance in which the government may refrain from alleging in the indictment an element it must yet prove at trial. Surely, logic as well as jurisprudential consistency would dictate that the indictment must contain all the requisite elements of the offense upon which the district court is required to instruct the jury.

The inconsistency comes about only because our circuit, contrary to every other circuit, clings to a problematic gloss on 21 U.S.C. § 846, insisting, despite a complete lack of textual support in the statute, that in order to convict under this section the government must prove the commission of an overt act in furtherance of the conspiracy. As a three-judge panel, we are bound by our previous holdings which unfortunately lead us to the present strange situation.

While I concur in the majority opinion, I write separately to stress that it makes no sense to continue to demand that the jury be instructed regarding an overt act when it is clear that the indictment need not allege one. Until the court sees fit to take this issue en banc and to align itself with every other court of appeals, we will continue this tiresome, judicially created inconsistency.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-30224

D.C. No. CR-90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, a/k/a LEE SHABANI,
DEFENDANT-APPELLANT

ORDER

[Filed Sept. 22, 1993]

Before: WALLACE, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judge Leavy has voted to reject the suggestion for a rehearing en banc. Chief Judge Wallace would accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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No. 93-981

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RESHAT SHABANI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 93-981

In The

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October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

RESHAT SHABANI,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Reshat Shabani, respectfully requests that this Court deny the Petition for Writ of Certiorari, filed by petitioner United States of America, seeking review of the Ninth Circuit's judgment in this case. The opinion of the Court of Appeals (App., *infra*, 1a-9a) is reported at 993 F.2d 1419.

OPINION BELOW

The opinion of the Court of Appeal (App., *infra*, 1a-9a.) is reported at 993 F.2d 1419.

STATEMENT OF THE CASE

Respondent incorporates by reference the statement of the case as set forth in the opinion. (App., *infra*, 1a-3a.)

REASONS WHY THE PETITION SHOULD BE DENIED

The government offers three reasons why this Court should grant certiorari:

1. The opinion below conflicts with other circuits.[1]

2. The question presented is "important and recurring."[2]

3. The Ninth Circuit will not correct its own error.[3]

With respect to reason 1, the government is correct in asserting that the opinion below, authored by Circuit Judge Wright with a concurring opinion by Chief Judge Wallace, is in conflict with the other circuits.

With respect to reason 2, the government's arguments are devoid of any meaningful context and are self-cancelling under the government's own analysis of the applicable decisional law.

The issue of whether the question presented is "important and recurring" needs to be contextualized.[4]

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[1] *See*, Petition, pp. 13-14.

[2] *See*, Petition, p. 14.

[3] *See*, Petition, p. 15.

[4] The government makes no real effort to offer a contextual analysis other than the tautology that, "[T]he question whether

For example, the Ninth Circuit in its opinion cites five (5) cases regarding the elements of proof to sustain a drug conspiracy conviction.

Significantly, in four of the five cases cited, the Ninth Circuit held that an overt act had been proven and went on to sustain the conspiracy conviction.

In *United States v. Garza*, 980 F.2d 546 (9th Cir. 1992), the Court held that the trial "court's failure to give a conspiracy instruction that required an overt act as an element to prove conspiracy was harmless beyond a reasonable doubt because the jury found beyond a reasonable doubt that he had committed an overt act in furtherance of the conspiracy." *Id.* at 554.

In *United States v. Navarro*, 979 F.2d 786 (9th Cir. 1992), the Court sustained the jury's finding that Navarro had sold two grams of heroin and thus satisfied the overt act requirement. *Id.* at 788-789.

In *United States v. Smith*, 924 F.2d 889 (9th Cir. 1991), the Court held that the evidence supported a conspiracy conviction. *Id.* at 894 and 894, fn. 1.

In *United States v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990), the Court affirmed the conspiracy conviction because based on the evidence "a jury could confidently conclude that Magana played a central role in a drug conspiracy." *Id.* at 409.

In *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992), the Court vacated the conspiracy conviction as to

---

proof of an overt act is required under 21 U.S.C. § 846 arises in every trial under the statute." Petition, p. 14.

two defendants on grounds unrelated to the overt act requirement:

> While the government submitted more than enough evidence that a narcotics conspiracy existed among several individuals *other* than Gaxiola and Vasquez, the evidence does not establish that the defendants here agreed to or knowingly assisted the conspiracy. *Id.* at 553.

Thus, the very cases which form the basis of the opinion below suggest that the question presented is not quite as urgent as the government has argued.

In order to bolster its contention that the question presented is urgent, the government makes a "domino effect" argument. At page 14 of its Petition, the government argues as follows:

> Moreover, the Ninth Circuit's analysis, if applied, beyond the immediate setting of Section 846, would call into question the construction of a large number of important criminal conspiracy statutes that contain no express overt act requirement.

This argument is a dialectal sleight-of-hand because the government knows full well that the Ninth Circuit has never extended the overt act requirement to any other criminal conspiracy statute. At page 4 of its Petition, the government notes:

> Moreover, the court observed that in construing other conspiracy statutes that contain no express

> overt act requirement, the Ninth Circuit "ha[s] held that proof of an overt act is unnecessary."[5]

Hardly the language which would suggest that the opinion below will be the domino that will tumble all the federal criminal conspiracy statutes.

The government's final argument is that the Ninth Circuit will not "correct its own error." Petition, p. 15. Two observations are pertinent. Firstly, the Ninth Circuit has not yet addressed this issue en banc. The fact that on one occasion a circuit refused to hear the issue en banc should not be dispositive. As respondent has shown above, in all cases cited in the opinion below, the Court either affirmed the conspiracy conviction or reversed on other grounds, i.e., the failure to prove an agreement to conspire in *United States v. Vasquez-Chan*, 978 F.2d 546 (9th Cir. 1992).

Thus, at this point, we have no certain track record that the Ninth Circuit will in the near future refuse to hear the question presented en banc.

---

[5] The full quote from the opinion is that "When we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of any overt act is unnecessary." App. 4a.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: January 12, 1994 Respectfully submitted,

BUSHNELL, CAPLAN & FIELDING
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Attorney for Reshat Shabani, Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 91-30224

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, a/k/a LEE SHABANI,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted Dec. 8, 1992
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Before: WALLACE, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

Shabani appeals his conviction of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He argues that the government failed to plead or prove an essential element of the crime. The indictment did not allege that an overt act was committed to further the conspiracy. In defining the offense, the jury instructions also omitted mention of an overt act. We conclude that the indictment was legally sufficient but hold that the district court erred in not instructing the jury on the requirement of an overt act. The jury was precluded from finding all the elements necessary to convict. We must reverse.

I

The government alleged that Shabani moved to Alaska and entered into a drug distribution scheme with his girlfriend, her family and their associates. According to the prosecution, Shabani was the supplier arranging to have the cocaine brought to Anchorage from California. The girlfriend, Mayfield, and another friend, Pinjoli, handled the distribution, making many of the sales to Mayfield's relatives. FBI agents purchased drugs from the coconspirators during an undercover investigation. Mayfield pleaded guilty and agreed to cooperate with the prosecution.

Shabani stood trial alone, charged with conspiracy to distribute cocaine. He moved to dismiss the indictment for failing to allege an essential element of the crime, the commission of an overt act. The district court denied the motion.

His defense at trial focused on the lack of direct evidence linking him to any of the drug sales. The major witnesses included Mayfield and her relatives, all of whom testified pursuant to plea agreements. Shabani suggested that they had concocted a story about his involvement to gain lenient treatment from the federal prosecutor.

Before the case went to the jury, Shabani again raised the overt act issue, requesting that the court modify the jury instructions to mention that proof of an overt act was necessary to convict. The court declined to do so. The jury returned a guilty verdict. The court sentenced Shabani to 160 months imprisonment, followed by a 60-month term of supervised release unless deported.

II

A. Failure to include overt act in the indictment

The parties alert us to an apparent conflict in this circuit as to whether an overt act must be proved or alleged to sustain a drug conspiracy conviction. Our recent cases restate consistently that proof of a Section 846 violation requires (1) an agreement, (2) to engage in criminal activity, and (3) one or more overt acts in furtherance of the conspiracy. *See, e.g., United States v. Garza,* 980 F.2d 546, 554 (9th Cir.1992); *United States v. Navarro,* 979 F.2d 786, 789 (9th Cir.1992); *United States v. Vasquez-Chan,* 978 F.2d 546, 553 (9th Cir.1992); *United States v. Smith,* 924 F.2d 889, 894 n. 1 (9th Cir.1991); *United States v. Magana-Olvera,* 917 F.2d 401, 409 (9th Cir.1990). The Ninth Circuit Model Jury Instructions also mention an overt act as one of the elements. Ninth Cir.Crim.Jury Inst., 8.05A.

Yet, language in *United States v. McCown,* 711 F.2d 1441 (9th Cir.1983) and *United States v. Tavelman,* 650 F.2d 1133 (9th Cir. 1981), *cert. denied,* 455 U.S. 939, 102 S.Ct. 1429, 71 L.Ed.2d 649 (1982), suggests that

> [a]n indictment under 21 U.S.C. § 846 is sufficient if it alleges: a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated, *even if it fails to allege or prove any specific overt act in furtherance of the conspiracy.* (emphasis added)

McCown, id. at 1450 (quoting *Tavelman, id.* at 1137).

We see merit in the government's argument that our recent cases requiring proof of an overt act stand on weak ground. The plain language of 21 U.S.C. § 846, in contrast

to the general conspiracy statute, 18 U.S.C. § 371, does not mention an overt act. When we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of an overt act is unnecessary. *See, e.g., United States v. Skillman*, 922 F.2d 1370, 1375 (9th Cir.1990) (conspiracy to deprive another of civil rights in violation of 18 U.S.C. § 241), *cert. dismissed*, ___ U.S. ___, 112 S.Ct. 353, 116 L.Ed.2d 275 (1991). So has the Supreme Court. *See, e.g., Singer v. United States*, 323 U.S. 338, 65 S.Ct. 282, 89 L.Ed. 285 (1945) (Selective Service Act).

The omission of overt act language from the text of 21 U.S.C. § 846 suggests that Congress, in enacting the Controlled Substances Act, established a distinct definition of conspiracy for narcotics crimes, one that does not require an overt act. *See United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir.1987). For these reasons, every other circuit holds that proof of an overt act is not necessary.[1]

---

[1] *See United States v. Sassi*, 966 F.2d 283, 285 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 509, 121 L.Ed.2d 444 (1992); *United States v. Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States v. Covos*, 872 F.2d 805, 810 (8th Cir.), *cert. denied*, 493 U.S. 840, 110 S.Ct. 124, 107 L.Ed.2d 85 (1989); *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), *cert. denied*, 488 U.S. 836, 109 S.Ct. 99, 102 L.Ed.2d 74 (1988); *United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir. 1987); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984); *United States v. Alberti*, 727 F.2d 1055, 1060 (11th Cir.), *cert. denied*, 469 U.S. 862, 105 S.Ct. 199, 83 L.Ed.2d 131 (1984); *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981); *United States v. Knuckles*, 581 F.2d 305, 311 (2d Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *United States v. DeJesus*, 520 F.2d 298, 301 (1st Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 126, 46 L.Ed.2d 94 (1975).

Clearly, the district court believed that this circuit should abandon its minority approach. In declining to follow the authority requiring proof of an overt act, Judge Holland made a fair attempt at resolving our confusing circuit law. He reached this decision "with considerable reluctance and a lot of caution," inviting counsel to appeal so that we might review the question thoroughly.

We understand the district court's frustration with seemingly contradictory opinions, as well as its desire to avoid a conflict with persuasive authority from all the other circuits. Nevertheless, as a three-judge panel, we are bound by this court's previous decisions. *United States v. Washington*, 872 F.2d 874, 880 (9th Cir.1989). We must attempt to resolve the tension in our case law. Only if the cases prove irreconcilable must we call for en banc review. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir.1992) (en banc), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1429, 122 L.Ed.2d 797 (1993).

We do not believe that *McCown* controls the issue we must decide today. In *McCown*, the appellants challenged that an indictment was defective because it "fail[ed] to state with specificity the time during which the conspiracy was operative." 711 F.2d at 1450. We ruled that the indictment gave sufficiently specific beginning and ending dates. The overt act issue played no part in *McCown's* central holding. The language that it was unnecessary to include an overt act in the indictment was dictum that we need not follow.[2]

---

[2] Indeed, we are puzzled by how the court arrived at this conclusion. Both *McCown* and *Tavelman* cite to an out-of-circuit

The issue of overt acts played a more critical part in *Tavelman*. The appellants directly challenged their indictments as constitutionally defective because of failure "to allege specific facts or overt acts." 650 F.2d at 1137. They were indicted on two counts. Count One alleged a cocaine conspiracy. Count Two alleged that the appellants violated the Travel Act by performing interstate acts in furtherance of the intent to distribute cocaine. We held that the indictments were sufficient even though they failed to allege an overt act for the conspiracy charge.

A narrow reading of the case suggests that this was because Count Two supplied the missing overt act. The appellants had conceded that "the existence of a substantive count may substitute for a definite statement of essential facts or overt acts." *Id.* Yet *Tavelman* indicated no such restrictions on its holding. It relied on the general proposition that "[c]ourts do not require as detailed a statement of an offense's elements under a conspiracy count as under a substantive count." *Id.* Its statement about indictments being sufficient even though omitting overt acts sweeps broadly.

This does not mean, however, that *Tavelman* conflicts irreconcilably with our other line of cases. It addresses only what the government must allege in an indictment,

---

case, *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978), *overruled on other grounds, United States v. Rodriguez*, 612 F.2d 906 (5th Cir. 1980) (en banc), *aff'd*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), for the proposition that the indictment need not allege an overt act. But the basis for *Marable's* holding was that the Fifth Circuit in contrast to this court, does not require that the government even prove an overt act at trial. *Id.*

not what must be proved at trial. Our other cases hold clearly that the government must demonstrate the commission of an overt act to sustain a conviction. We conclude that *Tavelman* excuses any deficiencies in the indictment at issue here.

B. Failure to Instruct on an Overt Act

We review de novo whether the district court's instructions to the jury misstated the elements of a statutory crime. *Garza*, 980 F.2d at 554. Jury instructions omitting an element of the offense are constitutional error. *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir.1991).

The court erred in declining to modify the jury instructions to include an overt act. As we have indicated, our cases hold clearly that the government must prove this element to sustain a conviction. The jurors heard testimony about overt acts. Witnesses said that Shabani drove a truck at least twice to accept drug deliveries. But the jurors did not necessarily have to rely on this evidence to convict of conspiracy as defined in the jury instructions.

We decline to speculate about how the jury might have weighed this evidence if properly instructed. As a result, we cannot say that the instructional error was harmless. To find harmless error, we would have to conclude that "no rational jury could have made [its] findings without also finding the omitted or presumed fact to be true." *Id.* at 425. We have deemed omission of the overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act. *See*

United States v. Garcia, 988 F.2d 965, 969 (9th Cir.1993); *United States v. Baldwin*, 987 F.2d 1432, 1439 (9th Cir.1993); *Garza*, 980 F.2d at 554; *United States v. Harrison-Philpot*, 978 F.2d 1520, 1522 (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 239, 124 L.Ed.2d 294 (1993). Yet Shabani's conviction rested on the single conspiracy count. As the case was submitted to them, the jurors did not have to find an overt act or its functional equivalent. They were precluded from finding an element necessary to convict.

III

Because we find instructional error, we do not reach the sufficiency of the evidence, nor do we address the other issues raised on appeal. We conclude that the district court's failure to instruct on an overt and prevented the jury from finding an element necessary to convict Shabani of conspiracy under 21 U.S.C. § 846. We reverse and remand.

REVERSED AND REMANDED.

WALLACE, Chief Judge, concurring:

In light of our holding that the indictment in this case was sufficient despite failing to allege an overt act, our conclusion that the district court erred in failing to instruct the jury that the government was required to prove the commission of an overt act may seem rather odd. Indeed, I am aware of no other circumstance in which the government may refrain from alleging in the indictment an element it must yet prove at trial. Surely, logic as well as jurisprudential consistency would dictate

that the indictment must contain all the requisite elements of the offense upon which the district court is required to instruct the jury.

The inconsistency comes about only because our circuit, contrary to every other circuit, clings to a problematic gloss on 21 U.S.C. § 846, insisting, despite a complete lack of textual support in the statute, that in order to convict under this section the government must prove the commission of an overt act in furtherance of the conspiracy. As a three-judge panel, we are bound by our previous holdings which unfortunately lead us to the present strange situation.

While I concur in the majority opinion, I write separately to stress that it makes no sense to continue to demand that the jury be instructed regarding an overt act when it is clear that the indictment need not allege one. Until the court sees fit to take this issue en banc and to align itself with every other court of appeals, we will continue this tiresome, judicially created inconsistency.

(3)

Supreme Court, U.S.
FILED
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No. 93-981

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

We explained in our petition that the Ninth Circuit's decision, which holds that the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act in furtherance of the conspiracy, conflicts with the decisions of 11 other circuits. Pet. 13 & n.8. Respondent acknowledges that conflict (Br. in Opp. 2), as did the Ninth Circuit (Pet. App. 4a & n.1). We also explained that the Ninth Circuit's decision cannot be reconciled with the text of Section 846, which contains no overt act requirement, or with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913), which make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act.

Pet. 5-12. Respondent does not challenge that submission, and the Ninth Circuit admitted that "[its] recent cases requiring proof of an overt act stand on weak ground." Pet. App. 4a. This Court should correct the Ninth Circuit's error and resolve the acknowledged conflict among the circuits.

1. Respondent contends that the question presented here is not an important and recurring one. That contention does not withstand scrutiny.

a. Respondent relies primarily (Br. in Opp. 3-4) on the fact that in some cases the Ninth Circuit has applied "harmless error" analysis to uphold convictions under 21 U.S.C. 846, despite the trial court's failure to instruct the jury that proof of an overt act was required. As we have explained, however, in other cases, including this one, the Ninth Circuit has reversed convictions under Section 846 because of the trial court's failure to give an overt act instruction. See, *e.g.*, *United States* v. *Foster*, 978 F.2d 716 (Table), petition for cert. pending, No. 93-1004 (filed Dec. 22, 1993); *United States* v. *Simpson*, No. 92-10155 (9th Cir. Nov. 30, 1993). Thus, the Ninth Circuit's erroneous interpretation has led to the reversal of valid convictions, and will no doubt continue to do so unless corrected.

Moreover, the consequences of the Ninth Circuit's error are not limited to the reversal of valid convictions. By requiring trial courts in prosecutions under 21 U.S.C. 846 to instruct the jury that proof of an overt act is required, the Ninth Circuit's decision allows the acquittal of some defendants who have committed the offense proscribed in Section 846. The Ninth Circuit's decision thus thwarts Congress's intention to punish those who conspire to commit

drug offenses even in the absence of proof of an overt act.

b. Respondent observes (Br. in Opp. 5) that in at least one decision the Ninth Circuit has held that proof of an overt act is not required under a conspiracy statute that, like 21 U.S.C. 846, does not contain an express overt act requirement. See also Pet. App. 4a (citing *United States* v. *Skillman*, 922 F.2d 1370, 1375 (1990) (proof of overt act is not required under civil rights conspiracy statute, 18 U.S.C. 241), cert. dismissed, 112 S. Ct. 353 (1991)). The need for further review of the Ninth Circuit's erroneous interpretation of 21 U.S.C. 846, however, is not diminished by the fact that the Ninth Circuit has interpreted other conspiracy statutes correctly. As the panel recognized, the Ninth Circuit's decisions concerning other conspiracy statutes that do not contain an express overt act requirement confirm that the Ninth Circuit erred in holding that proof of an overt act is required under Section 846. Pet. App. 4a. Moreover, the inconsistency in the Ninth Circuit's approach will create confusion and uncertainty in prosecutions under conspiracy statutes that do not contain an express overt act requirement and in which the question whether proof of an overt act is required has not yet been resolved. Cf. *United States* v. *Thomas*, 8 F.3d 1552, 1560 (11th Cir. 1993) (noting conflict among the circuits on the issue of whether proof of overt act is required to establish Hobbs Act conspiracy, 18 U.S.C. 1951).

2. Petitioner suggests (Br. in Opp. 5) that the Ninth Circuit might resolve the question presented here by granting rehearing en banc in some future case. As we explained in our petition (at 15), however,

that possibility is extremely remote. The Ninth Circuit denied rehearing en banc in this case despite the panel's criticism of the Ninth Circuit's position on the question presented here and despite Chief Judge Wallace's separate concurrence urging the Ninth Circuit "to take this issue en banc and to align itself with every other court of appeals." Pet. App. 9a; see also *United States* v. *Baker*, No. 89-10302 (9th Cir. Dec. 13, 1993), slip op. 14019 n.22 ("Although every other circuit has held that an overt act is not an element of a § 846 drug conspiracy, this court continues to differ.") (citing *Shabani*). Under these circumstances, the Ninth Circuit's denial of rehearing en banc strongly suggests that the Ninth Circuit's error will not be corrected by the en banc process.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1994

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(6)

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
DECEMBER 21, 1993
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Docket No. CR 90-063HRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, DEFENDANT

DOCKET ENTRIES

1990		
Aug. 29	(1)	Fld INDICTMENT.
29	(2)	Fld GRAND JURY MINS: pre-trial detention, set for arrgn.
29	(3)	Fld documents transferred from A90-126M; MAG Mo re init appear, MAG CRT MIN re init appear, MAG ORDER of temp detent, CY 4 CJA 20, MAG CRT MIN re prelim/detent hearing MAG ORDER of detent pend trial, MAG MO re appoint of interpreter, warrent [*sic*] of arrest, cy 1 CJA 20, clerk's not re interpreter fees.
30	(4)	Fld MAG MO setting arrgnment for Tues, 9/4/90 @ 11:00 A.M. in Rm 176. Cy J. Bottini, J. Murtagh, R. Vrlaka, USM, PO,EW.

1990

Sept. 4	(5)	Fld MAG CRT MIN re arraign-ment. Pleads NG. Def DE-TAINED pretrial deadlines set. Cy J. Bottini, J. Murtagh, USM, PO, FA.
4	(6)	Fld MAG ORDER re prep for trial. Cnsl to meet by 9/7/90 Mots due by 9/21/90. Cy J. Bottini, J. Murtagh.
6	(—)	Sent notice to Judge Holland re ST deadlines. Cy Tr
11	(7)	Fld CRT MIN TBJ set for Mon, 10/22/90 @9:00 A.M. deadlines set. Cy J. Bottini, J. Murtagh, R. Vrlaka, PO, USM, Jury Clerk, Mag B.
21	(8)	Fld def's mot for order of preserv of & product of (in camera if necess) agent's notes of interviews as Jencks Act materials.
21	(9)	Fld def's request for exculpatory material pursuant to Brady v. Maryland w/atch afdvt.
21	(10)	Fld def's mot for names and addres [*sic*] of all witness to investigation in case and whom plft not call at trial.
21	(11)	Fld def's mot leave to file mot B/P 20 day after arrngment and B/P : overt acts of alleged conspiracy, known unindicted co-conspir.

1990

Sept. 21	(12)	Fld def's mot, in camera inspect of closed portion of sent in A90-023CR for Brady materials w/atch afdvt.
21	(13)	Fld def's mot for discvy & inspect pursuant to Rule 16(a)(1)(D) w/atch afdvt.
21	(14)	Fld def's mot for order direct plat to disclose: surval logs, audio record, video record, photos, and pen regist from A90-023CR & A90-024CR w/atch memos.
25	(15)	Fld pltf's non-opp mot for 3 day ext to respond to def's mots w/atch afdvt.
27	(15)	Fld MAG ORDER grant pltf's non-opp mot for 3 day ext. Cy J. Bottini, J. Murtagh.
Oct. 4	(16)	Fld pltf's resp to def's mot for names & address of all witness to the investigation, A90-023CR, A90-024CR, whom pltf does not intend to call.
4	(17)	Fld pltf's resp to def's mot for discvy & inspect pursuant to Rule 16.
4	(18)	Fld pltf's resp to def's mot for order of preserv of & product of agent's notes of interview as Jencks Act material.

1990

Oct.	5	(19)	Fld pltf's opp to def's request for exculpatory material.
	5	(20)	Fld pltf's resp to def's mot for B/P w/atch memo.
	5	(21)	Fld pltf's resp to def's mot for in camera inspec of closed portion of sent in A90-023CR for Brady material.
	9	(22)	Fld MAG MO re hearing on PTMs set for Fri, 10-12-90 at 10:00 A.M. Cy J. Bottini, J. Murtagh, USM,PO.
	9	(23)	Fld pltf's resp to def's mot for order direct govt to disclose logs, recordings photos from inter-related cases.
	11	(24)	Fld pltf's trial memo.
	11	(25)	Fld pltf's proposed jury instructions.
	11	(26)	Fld pltf's proposed voir dire questions.
	12	(27)	Fld def's reply to pltf's resp to def's mot for B/P.
	12	(28)	Fld def's reply to pltf's resp to defs' mot for order direct pltf to disclose: logs, recordings, photos, from inter-related cases.
	12	(29)	Fld def's reply to pltf's opp to def's request for exculpatory material.

1990

Oct.	12	(30)	Fld def's reply to pltf's resp to def's mot for names/address of witnesses to case A90-023CR, A90-024CR, whom pltf does not intend to call.
	12	(31)	Fld def's reply to pltf's resp to def's mot for discvy/inspection pursuant to Rule 16(a)(1)(A).
	12	(32)	Fld def's reply to pltf's resp to def's mot for order of preservat of/and product of agent's notes as Jencks Act Material.
	12	(33)	Fld def's reply to pltf's resp to def's mot for in camera inspect of closed portion of IOS in A90-023CR, Brady material.
	15	(34)	Fld def's proposed voir dire questions on behalf of def personal, occupational & education background w/atch memo.
	15	(35)	Fld MAG CRT MIN dated 10-12-90 re hearing on all pend discvy mots; individual mot signed and file herewith. Cy J. Bottini, J. Murtagh, Finan Admin.
	15	(36)	Fld MAG ORDER re def's mot for order direct disclose; grant as ordered. Cy J. Bottini, J. Murtagh. (#14)

1990

Oct.	15	(37)	Fld MAG ORDER re def's request for exulpatory info pltf does not intend to call at trial. Cy J. Bottini, J. Murtagh. Granted as ordered. (#10)
	15	(38)	Fld MAG ORDER grant mot for in camera inspect of closed portion of IOS in A90-023CR (#12). Cy J. Bottini, J. Murtagh.
	15	(39)	Fld MAG ORDER grant mot for discvy & inspect pursuant to Rule 16. Cy J. Bottini, J. Murtagh. (#13)
	15	(40)	Fld MAG ORDER deny def's mot for leave to file mot for B/P 20 days after arrngment (#11). Cy J. Bottini, J. Murtagh.
	15	(41)	Fld MAG ORDER grant def's mot for order of preservat of & production of agent's notes as Jencks Act Material. Cy J. Bottini, J. Murtagh. (#8)
	18	(42)	Fld MAG ORDER re def's mot for disclose of surveil logs; granted as written. Cy J. Bottini, J. Murtagh.
	19	(43)	Fld def's trial memo re in camera review.
	22	(44)	Fld CRT-MIN re defs; TBJ on 10-22-90 is vacated, to be reset, deadlines set re filing of brief on the witness question. Cy J. Bottini, J.

1990

Oct.	22	(44)	Murtagh, USM, PO, Mag B, Jury Clerk, Finan Admin, R[.] Vrlaku.
	23	(—)	Sent Judge Holland Memo re St deadlines.
	24	(45)	Fld ORDER re case status; reply by pltf by 10-24, def reply 10-29. Cy J. Bottini, J. Murtagh, R. Cavanaugh, MAG B.
	24	(46)	Fld pltf's memo re invocation of 5th Amend right by witness.
	29	(47)	Fld def's resp to pltf's memo re invocation 5th amend rights by witness w/atch afdvt.
Nov.	6	(48)	Fld MO set TBJ for Mon, 11-26-90 at 9:00 A.M. Cy J. Bottini, J. Murtagh, R. Vrlaka, Mag B, USM, PO, Jury Clerk.
	7	(49)	Fld ORDER re witness; further hearing set 11-15-90 at 9:15 A.M. Cy J. [B]ottini, J. Murtagh, R. Vrlaka.
	13	(50)	Fld def's mot to cont TBJ w/atch afdvt.
	14	(51)	Fld pltf's mot to compel testimony of D. Pinjoli.
	15	(52)	Fld ORDER resched TBJ for 11-28-90 at 9:00 A.M. and hearing on 11-15-90 is vacated and reset for 11-26-90 at 9:00 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk.

1990

Nov. 16	(53)	Fld CRT MIN re hearing re Pinjoli as Witness; hearing cont until 11-26-90 at 9:00 A.M., TBJ reset for Wed, 11-28-90 at 9:00 A.M. Cy K. Loeffler J. Murtagh, R. Cavanaugh, USM, PO, Jury Clerk.
26	(54)	Fld CRT MIN re hearing on witness; Crt sign order compel witness to testify; R. Cavanaugh as cnsl to witness, Isan Ajdari appted as interpreter in place of R. Vrlaka. Cy J. Bottini, J. Murtagh, R. Cavanaugh, I. Ajdari, R. Vrlaka, USM, PO, Finan Admin.
26	(55)	Fld ORDER compelling testimony of D. Pinjoli. Cy J. Bottini, J. Murtagh, R. Cavanaugh.
28	(56)	Fld CRT MIN re TBJ; TBJ is vacated to be reset for a later date, cnsl to fle mot re indictment, Pinjoli testimony by 12-2-90. Hearing set for 12-10-90 at 8:30 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk, Mag B, Isan Ajdari, Finan Admin.
29	(57)	Fld ORDER vacate TBJ to a later date, deadlines set re mots. Cy J. Bottini, J. Murtagh, R. Cavanaugh, I. Ajdari.
Dec. 3	(58)	Fld pltf's mot to intro prior trial testimony of Pinjoli w/atch afdvt.

1990

Dec. 3	(59)	Fld def's mot to dismiss indictment for failure to allege essential element w/atch memo.
7	(60)	Fld pltf's memo in opp to def's mot to dismiss & in supp of pltf's prop jury instruct re overt acts.
7	(61)	Fld def's opp to pltf's mot to intro prior trial testimony of D. Pinjoli w/atch afdvt.
7	(62)	Fld Entry of Appearance for Witness Pinjoli by R. Cavanaugh.
7	(63)	Fld afdvt of cnsl by R. Cavanaugh.
10	(64)	Fld CRT MIN re hearing on mots re indictment; I. Ajdari appt interpreter, mot to dismiss denied, pltf's mot to intro prior testimony resched for 12-11-90 at 8:30 A.M. Cy J. Bottini, J. Murtagh, PO, USM.
11	(65)	Fld MO set TBJ for Mon, 1-14-91 at 9:00 A.M. Cy J. Bottini, J. Murtagh, USM, PO, Jury Clerk, Mag B.
11	(66)	Fld CRT MIN re hearing on mot re indictment and testimony of witness; TBJ set 1-14-91 at 9:00 A.M. Cy J. Bottini, J. Murtagh.
11	(67)	Fld ORDER appt interpreter. Cy J. Bottini, J. Murtagh, USM, PO, I. Ajdari, Finan Admin.

1991

Jan. 7	(68)	Fld ORDER re notice to cnsl; re witness. Cy K. Loeffler, J. Murtagh, R. Cavanaugh.
11	(69)	Fld ORDER appt. R. Cavanaugh as cnsl for D. Pinjoli. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO.
14	(70)	Fld CRT MIN re TBJ-Day 1; cont 1-15-91.
14	(71)	Fld pltf's stip re exhibits 1 & 2.
15	(72)	Fld CRT MIN re TBJ day 2; cont til 1-16-91.
16	(73)	Fld CRT MIN re TBJ day 3; jury begins deliberate.
17	(74)	Fld MO set contempt hearing re Witness Pinjoli for Thurs, 1-17-91 at 1:30 p.m. Cy J. Bottini, J. Murtagh R. Cavanaugh, USM, PTS.
17	(75)	Fld CRT MIN re TBJ day 4; def found guilty, IOS set 3-21-91 at 8:30 A.M., def to remain in cust w/atch jury notes. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO, Mag B.
17	(76)	Fld jury instructions.
17	(77)	Fld CRT MIN re contempt hearing on Witness Pinjoli; guilty of criminal contempt, sent 4 mos addtl to

1991

Mar. 17	(77)	other sent, to serve consecutive. Cy J. Bottini, J. Murtagh, R. Cavanaugh, USM, PO.
18	(78)	Fld cy 4 of CJA 20 re witness Pinjoli to R. Cavanaugh.
15	(79)	Fld pltf's sent memo & non-opp to present report.
19	(80)	Fld def's mot for exped consider re cont IOS w/atch afdvt.
19	(81)	Fld def's non-opp to cont IOS w/atch afdvt.
19	(82)	Fld ORDER grant def's mot for exped consider.
19	(83)	Fld ORDER reset IOS for 4-11-91 at 8:30. Cy J. Bottini, I. Ajdari, J. Murtagh, USM, PO.
20	(—)	Fld REPORTER'S TRANSCRIPTS RE TBJ (PLACED BEHIND FILE IN BINDER) Vol. 1 TBJ Day 1 - 1-14-91 Vol. 2 TBJ Day 2 - 1-15-91 Vol. 3 TBJ Day 3 - 1-16-91 Vol. 4 TBJ Day 4 - 1-17-91
Apr. 4	(84)	Fld def's obj to present report.
11	(85)	Fld def's mot & appli for non-res cnsl.
11	(86)	Fld CRT MIN re IOS; to cont at later date, G. Howard to submit entry of appear, J. Murtagh, to w/d.

1991

Apr.	11	(86)	Cy J. Bottini, J. Murtagh, G. Howard, USM, PO.
	16	(87)	Fld ORDER re IOS cont; IOS to be reset. Cy J. Bottini, G. Howard, USM, PO.
	16	(88)	Fld MO def's mot for non-assoc non-res cnsl denied. Cy J. Bottini, G. Howard, USM, PTS.
	23	(—)	Fld REPORTER'S TRANSCRIPT RE: (Placed behind file in binder) TBJ date 10-22-90 Hearing on mot to compel testimony - 11-26-91. TBJ date 11-28-90 Hearing on mot to dismiss indict - 12-10-90. Hearing on mot to employ TBJ test & mots re indict - 12-11-90.
	25	(89)	Fld pltf's mot to strke def's mot for new TBJ, or deny mot w/atch memo.
May	21	(90)	Fld cy 1 CJA 20 approv pymt in amt of $1,387.50 to R. Cavanaugh re Witness Pinjoli.
	21	(89)	Fld ORDER grant pltf's mot to strike def's mot for new TBJ. Cy J. Bottini, J. Murtagh.
	22	(91)	Fld MO set IOS for Thurs, 5-30-91 at 8:30. Cy J. Bottini, J. Murtagh, USM, PO.

1991

May	28	(92)	Fld pltf's mot on short time to cont IOS w/atch afdvt.
	28	(93)	Fld def's consent to appear as local cnsl - J. Gibbons.
	28	(92)	Fld ORDER grant pltf's mot to cont IOS; IOS reset for 6-5-91 at 8:30. Cy J. Bottini, J. Gibbons, G. Howard, I. Ajdari, USM, PO.
June	5	(94)	Fld CRT MIN re IOS; ECR Peerce; sent 160 mos, sprvsd rel 60 mos, spec asses $50.00, cnsl's appli to be atch to J. Gibbons consent to proceed (#93).
	5	(95)	Fld JUDGMENT - fnd G to Ct I, sent 160 mos, 60 mos sprvsd rel unless deprted, spec asses $50.00. Cy J. Bottini, J. Gibbons, G. Howard, R. Shabani, USM, PO, MAG B, Carmen.
	17	(96)	Fld def not of appeal. cc G.Howard, J.Gibbons, J. Bottini, Judge Holland, 9CCA.
July	1	(—)	Fld REPORTER'S TRANSCRIPT RE IOS ON 6-5-91. Cy PO. (Placed in binder behind file)
Aug	2	(97)	Fld cert cy of Judgment def deliver 7-17-91.
Nov	21	(98)	Fld exec subpoenas.

1992

Mar. 16 (99) Fld cy 9CCA order re brief sched, no cert record, new cnsl.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 91-30224

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, DEFENDANT-APPELLANT

DOCKET ENTRIES

7/3/91 DOCKET CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 6/17/91; setting schedule as follows: transcript shall be ordered by 7/8/91 for Reshat Shabani; transcript shall be filed by <date not set>; appellants' briefs, excerpts due by 9/16/91 for Reshat Shabani; appellees' brief due 10/16/91 for USA; appellants' reply brief due by 10/30/91 for Reshat Shabani. (RT required: y) (Sentence imp 160 mos) [91-30224] (wp)

7/30/91 USCA receipt for payment (010694) for the amount of $100 (date paid: 7/22/91) Copy of receipt sent to DC. [91-30224] (tsp)

2/11/92 Filed 42-1 Order to Show Cause for failure to file an opening brief [91-30224] Response due in fourteen days. [91-30224] (sm)

2/24/92 Received Appellant Reshat Shabani's response to order to show cause, re: non filing of appellant's opening brief (PROMO) Received check number 2772 dated 02/19/92 in the amount of $250.00 (FINANCE UNIT) [91-30224] (sm)

2/26/92 Received notice of appearance of Alan M. Caplan (Withdrew as counsel): attorney George C. Howard for Reshat Shabani) (CASEFILE) [91-30224] (sm)

2/26/92 Filed Appellant Reshat Shabani's motion to extend time to file appellant's opening brief ("motion for the setting of new briefing schedule due to the failure of prior counsel t [*sic*] comply with the previously set briefing schedule") served o [*sic*] 2/26/92 [2082495] (PROMO) (sm)

3/11/92 Filed order (Deputy Clerk: cb) The court is in receipt of Attorney Alan M. Caplan's notice of entry of appearance. The service list shall be amended accordingly. The court is also in receipt of former counsel's response to the order to show cause. On or before 03/25/92, former counsel shall send appellant's file to current counsel. If Attorney Howard fails to do so, Attorney Caplan shall inform this court immediately. The briefing schedule is as follows: the opening brief and excerpts of record are due 04/24/92, the answering brief is due 05/26/92, and the optional reply brief is due 14 days from

service of the answering brief. Court records do not currently reflect that the district court has issued the certificate of record. Appellant shall monitor the issuance of the certificate; absence of the certificate will block resolution of the appeal. Appellant is informed that a motion for procedural relief does not fall within the category of motions contemplated by Ninth Cir. R. 27-3. Subject to reconsideration if any objections filed within 10 days. [91-30224] (sm)

5/1/92 Filed motion of Appellant and deputy clerk order : (Deputy Clerk: ra) granting motion & order to extend time to file appellant's opening brief [2125241-1] appellants' opening brief due 5/26/92; the optional reply brief is due 14 days from service of the answering brief. No further extension of time to file the opening brief will be granted. Movant is informed that a motion for an extension of time to file a brief should include the position of opposing csl. (Motion recvd 4/15/92) [91-30224] (mhf)

5/5/92 Received from attorney George Howard Cashier's check number 1407604 dated 04/28/91 in response to order to show cause. (originally check bounced) (CASEFILE) [91-30224] (sm)

5/26/92 Filed original and 15 copies Appellant Reshat Shabani opening brief (Informal:

n) 41 pages and five excerpts of record in 1 volumes; served on 5/22/92 [91-30224] (sm)

5/27/92 Filed pre-sentencing report UNDER SEAL. [91-30224] (sm)

6/1/92 Filed certificate of record on appeal RT filed in DC 05/19/92 [91-30224] (sm)

6/15/92 10 day oral extension by phone of time to file Appellee's brief. [91-30224] appellees' brief due 7/6/92; optional reply brief due 14 days from service of answering brief (cb)

7/7/92 Filed Appellant Reshat Shabani's motion to extend time to file reply brief until 8/4/92, served on 7/6/92 [2169343] (work in progress, per PROMO/ahh) [91-30224] (sm)

7/8/92 Filed original and 15 copies appellee USA's 39 pages brief, 1 Supplemental Exc. vols; served on 7/6/92 [91-30224] (sm)

8/4/92 Received orig. 15 copies Reshat Shabani's reply brief (Informal: n) of 4 pages; served on 7/30/92 deficient late, motion to file pending. [91-30224] (sm)

8/10/92 Received USA additional citations, served on 8/5/92 (CASEFILE) [91-30224] (sm)

8/24/92 Calendar check performed [91-30224] (mw)

8/24/92 Filed order (Deputy Clerk; 1p) Movant is informed that a motion for an extension of time to file a brief should include the position of opposing counsel. Ninth Cir. R. 31-2.3(b)(8). Appellant's motion for an extension of time in which to file the optional reply brief is granted. The optional reply brief received 08/04/922 [*sic*] is ordered filed. [2169343-1] [91-30224] (sm)

8/24/92 Filed original and 15 copies Reshat Shabani reply brief, (Informal: n) 4 pages; served on 7/30/92 [92-30224] (sm)

9/2/92 Received Reshat Shabani additional citations, served on 9/1/92 (CASEFILE) [91-30224] (sm)

9/29/92 Calendar check performed [91-30224] (mw)

10/7/92 Calendar materials being prepared. [91-30224] [91-30224] (mw)

10/13/92 CALENDARED: Seattle December 10, 1992 9:00 a.m. * * * MOVED T [*sic*] TUES DEC 8 * * [91-30224] (mw)

10/23/92 Requested District Court to transmit record on appeal. Requested by: Johnny k. (jk)

10/26/92 Filed, as of 06/01/92 certified record on appeal in 6 Vols. (total): 5 Clerks Rec. 1 RTs (Original) [91-30224] [91-30224] (sm)

12/7/92 Received USA additional citations, served on 12/3/92 (PANEL) [91-30224] (sm)

12/8/92 ARGUED AND SUBMITTED TO J. C. WALLACE, Eugene A. WRIGHT, Edward LEAVY [91-30224] (tsp)

12/8/92 Received in Seattle, Reshat Shabani additional citations, served on 12/8/92 (PANEL) (sm)

2/17/93 Received Reshat Shabani additional citations, served on 2/16/93 (PANEL) [91-30224] (sm)

5/10/93 Received Reshat Shabani additional citations, served on 5/6/93. (PANEL) [91-30224] (jlc)

5/17/93 FILED OPINION: REVERSED REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. J. C. WALLACE, concurring; Eugene A. WRIGHT, author; Edward LEAVY.) FILED AND ENTERED JUDGMENT. [91-30224] (ck)

5/24/93 Filed USA motion to extend time to file petition for rehearing until 7/1/93, served on 5/21/93 [2358151] (sm)

5/24/93 Filed order (Deputy Clerk: sm) FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that the Plaintiff-Appellee USA may have until 07/01/93, to file a petition for rehearing and suggestion for rehearing en banc [2358151-1] [91-30224] (s [sic]

6/30/93 [2381504] Filed original and 40 copies Appellee USA petition for rehearing

with suggestion for rehearing en banc 11 p.pages, served on 6/29/93 (PANEL AND ALL ACTIVE JUDGES) (sm)

9/22/93 Filed order (J.C. WALLACE, Eugene A. WRIGHT, Edward LEAVY) The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED [2381504-1] [91-30224] (s [sic]

9/30/93 MANDATE ISSUED [91-30224] (jr)

10/8/93 Filed motion to recall the mandate; [91-30224] served on 10/7/93 to (EAW) [2442152] (jr)

10/14/93 Filed order (Eugene A. WRIGHT): The motion by the plaintiff, United States of America, to recall the mandate is GRANTED. This court's mandate is recalled and will be stayed for 30 days from the date of this order. [2442152-1] [91-30224] (sm)

10/15/93 Filed order (Eugene A. WRIGHT,): Aple's mtn to recall the mandate is GRANTED. This ct's mandate is recalled & will be stayed for 30 days from the date of this order. [91-30224] (mhf)

11/9/93 Filed USA's motion to extend day of mandate; [91-30224] served on 11/8/93 to *(EAW). [2461278] (jr)

11/17/93 Filed order (J. C. WALLACE): The government's motion is GRANTED. The stay of mandate issued on 10/14/93,

is extended to 12/21/93 pending the filing of a government petition for writ of certiorari. [2461278-1] [91-30224] (s [sic]

12/30/93 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-981 filed on 12/21/93. [91-30224] (sf)

3/2/94 Received notice from Supreme Court, petition for certiorari GRANTED on 2/22/94 (crw)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A90-063CR

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, A/K/A LEE SHABANI, DEFENDANT

INDICTMENT
[Filed Aug. 29, 1990]

COUNT I:
Conspiracy
Vio. of 21 U.S.C. § 846

THE GRAND JURY CHARGES THAT:

COUNT I

Beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, both dates being approximate and inclusive, within the District of Alaska and elsewhere, RESHAT SHABANI, a/k/a LEE SHABANI, did unlawfully and knowingly combine, conspire, confederate and agree with Dzemil [*sic*] Pinjoli, a/k/a "Jack", Pamela Mayfield and other persons known and unknown to the Grand Jury, to distribute cocaine, a Schedule II Narcotic-Controlled

Substance in violation of Title 21, United States Code, Section 841(a)(1), all of which is in violation of and contrary to Title 21, United States Code, Section 846.

A TRUE BILL.

/s/ Dale H. Long
Grand Jury Foreman

/s/ Wevley Wm. Shea
WEVLEY WM. SHEA
United States Attorney

/s/ Joseph W. Bottini
JOSEPH W. BOTTINI
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CR 90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, DEFENDANT

HEARING ON MOTION TO DISMISS INDICTMENT

BEFORE THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: KAREN L. LOEFFLER
Assistant U.S. Attorney
U.S. Attorney's Office
222 West 7th Avenue, #9
Anchorage, Alaska 99513
(907) 271-5071

For the Defendant: JOHN M. MURTAGH
Attorney at Law
1101 West 7th Avenue
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(907) 274-8664

Court Recorder: PATTY DEMETER
U.S. District Court
222 West 7th Avenue , #4
Anchorage, Alaska 99513-7564

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[2] ANCHORAGE, ALASKA—MONDAY, DECEMBER 10, 1990

(On record—8:33 o'clock a.m.)

THE CLERK: All rise. His Honor the Court, the United States District Court for the District of Alaska, is now in session, the Honorable H. Russel Holland presiding. Please be seated.

THE COURT: Good morning, ladies and gentlemen. We have set first this morning Case A90-063 CR, *United States* v. *Shabani*. When we last met on this matter, we made arrangements for the appointment of Mr. Ajdari as interpreter for the defendant. I'm not aware that any formal order has been entered in that regard yet, so Madam Clerk if you would check that for me and if a formal order has not been entered yet, would someone please find the standard form order that we use and get it to me so that I can sign that order?

Secondly, the—although not involved in what's going on today, I have signed an order appointing Mr. Cavanaugh to continue representation of Mr. Pinjoli

in connection with this case, since I have concluded that it is quite necessary that he be represented by counsel in connection with this proceeding.

Third thing, and the first of two that really have us here today, is a motion to dismiss the indictment filed after our last session. I have reviewed the papers that have been filed in support of an in opposition to the motion to [3] dismiss the indictment. We made no provision for replies so Mr.—I've lost one of my papers here, give me just a second to find what I've done with it. Mr. Murtagh, you did file an opposition to the—

MR. MURTAGH: I did, Your Honor.

THE COURT: —motion to dismiss.

MR. MURTAGH: No, excuse me, Your Honor. It was my motion to dismiss the indictment.

THE COURT: Oh, that's what—

MS. LOEFFLER: And my opposition.

MR. MURTAGH: The Government opposed.

THE COURT: That's why—I'm looking for something that doesn't exist. It is Monday morning. Mr. Murtagh, it's up to you, any reply you wish to offer at this point.

MR. MURTAGH: I wasn't able to find anything more than what was contained in the pleadings. I think I suggested in my argument and proposed order the basis for the Court to dismiss the indictment would be to conclude that the statement in *Tablemen* is outdated because of a later case from the Ninth Circuit that emphasized not in the context of an § 846, the importance of listing all the elements in an

indictment. The language in *Tablemen* seems to suggest that an overt act free indictment is sufficient. At least that's how I interpreted the language I cited in my pleading.

THE COURT: Well, I kind of think that's what the [4] case says, too, and I have a great deal of difficulty with it. I—as you know, I had thought about this situation some before the problem arose, I've now had a chance to look at it with some care. I guess I've got one question before I tell you what I think about the situation.

Ms. Loeffler, there was some discussion of the Government reindicting in this case simply as a precautionary measure. Has anything like that happened?

MS. LOEFFLER: It hasn't happened and it's not going to, Your Honor. Based on my review of the law, we will not reindict.

THE COURT: Well, that's sort of the message that I though I saw in your paperwork.

MS. LOEFFLER: No, we won't, Your Honor.

THE COURT: It is with considerable reluctance and a lot of caution that I turn a blind eye to Ninth Circuit precedence. I normally feel a very high obligation to follow them, even if I don't dis—even if I don't agree with the result. In this instance, I not only disagree with the result reached in the *Tablemen* and *Hernandez* cases, but I think they're just demonstrably illogical, not clearly thought out, they're totally at odds with what every other circuit in the country has done, and I've come to the conclusion that those cases are simply wrong when they say that an overt act has to be proved under 21 U.S.C. § 846.

[5] In the first place, § 846 is very conspicuous when placed in parallel and compared to 18 U.S.C. § 371 in that the latter expressly requires an overt act, and § 846 contains no such requirement. The plain language of the statute simply doesn't require the Government to plead or prove an overt act in support of a drug conspiracy.

It strikes me that the result reached in *Tablemen* and *Hernandez* create a totally illogical situation in that the cases suggest that the Government can indict without having any evidence of an overt act; the Government can subject a defendant to trial or at least to indictment without any proof whatsoever of an overt act. And yet when it comes to trial, these cases seem to say, oh, well, that's different, you have to prove an overt act when it comes to trial, even though you didn't have to have any evidence of it to indict. I think that's totally illogical.

It invites the Government to indict in situations where it perhaps cannot prove a case, it invites the Government to set up what in many instances could be a surprise situation for the defendant, in that the indictment need not allege any overt acts, but when it comes to trial, in theory at least, the Government can pull whatever evidence of overt acts it has out of that hat, as it were, without any disclosure of what it was that they were going to prove at trial. It invites surprise for the defendant, and I think that makes [6] no sense.

For these reasons, I am going to deny the motion to dismiss the indictment, and I'm not given to doing this, Mr. Murtagh, but if there's a conviction in this case, I very much hope that you will take this matter up to the Ninth Circuit Court of Appeals because I

think they need to look at this situation, look at it thoughtfully and thoroughly. I am concerned that what we have in *Tablemen* and *Hernandez* are knee-jerk reactions from overworked panels who come to a conspiracy case with a preconceived notion that, of course, conspiracies require the proof of overt acts without any serious analysis of whether that was really the intent of Congress or not. So the motion to dismiss will be denied.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CR 90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, DEFENDANT

HEARINGS ON MOTIONS REGARDING INDICTMENT

APPEARANCES:

For Plaintiff: Karen Loeffler

For Defendant: John Murtagh

At 8:34 a.m. court convened.

Court heard.

Isan Ajdari appointed interpreter for Defendant

Motion to Dismiss Indictment Denied.

Plaintiff's Motion to introduce prior testimony of Mr. Pinjoli to be rescheduled for December 11, 1990 at 8:30 a.m.

At 8:47 a.m. court adjourned.

cc: J. Bottini
J. Murtagh
US Marshal
Probation Office

Date: December 10, 1990
Deputy Clerk's Initials: PLD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CR 90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, DEFENDANT

VOLUME III—DAY 3
TRANSCRIPT OF TRIAL
BEORE THE HONORABLE H. RUSSEL HOLLAND
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff: KAREN L. LOEFFLER
Assistant U.S. Attorney
U.S. Attorney's Office
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Anchorage, Alaska 99513
(907) 271-5071

For the Defendant: JOHN M. MURTAGH
Attorney at Law
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[3-2] ANCHORAGE, ALASKA—WEDNESDAY, JANUARY 16, 1991

(On record at 9:10 o'clock a.m.)

(Jury Out)

THE CLERK: All rise. His Honor, the Court, this United States District Court for the District of Alaska is now in session, the Honorable H. Russel Holland presiding. Please be seated.

THE COURT: This is the continuation of trial in Case A90-63 Criminal, *United States of America versus Shabani*. Counsel, I have copies of the final version of the jury instructions for you. I think that you will find that we have incorporated into those instructions the few changes and additions that we talked about yesterday afternoon. I would alert you to one thing: there are a couple of instances in which I simply changed the order of the instructions because I thought it made more sense to read an instruction here rather than there. But with that exception, the instructions are exactly as we discussed them.

(Pause)

Does the Government have any exceptions to the instructions that I propose to give?

[3-3] MS. LOEFFLER: No, we don't, Your Honor.

THE COURT: Does the Government have any exceptions to my failure to give any requested informations?

MS. LOEFFLER: No, we don't.

THE COURT: Mr. Murtagh, does the defendant have any exceptions to the instructions that I propose to give?

MR. MURTAGH: Yes, Your Honor. As to Jury Instruction No. 22, this connects up with the discussion we had earlier in this case as to the Ninth Circuit's interpretation of the elements under the statute at hand, the clear language of the Ninth Circuit case of *United States v. Tabelman*, T-a-b-e-l-m-a-n, indicates that an overt act is an element of that offense. I think the record has had this discussion on it on several occasions. When we were dealing with the indictment sufficiency, it should be noted that five pages prior to its listing the elements in *Tabelman*, *Tabelman* said an indictment without that element was sufficient. So that's really all the farther the Court had to conduct the analysis in the sense of the indictment sufficiency. I recognize that the Government has submitted sort of a historical analysis of that language and concludes that it arises from a historical anomaly or mistake. But on the printed page of the Ninth Circuit decisions, it says that an overt act is a requirement and Instruction 22 does not contain that.

THE COURT: Thank you, sir. The exception is noted. And as I indicated to you earlier, Mr. Murtagh,

if there's a conviction in this case, I quite literally invite [3-4] you to take this matter up. I think the Ninth Circuit Court of Appeals has really not considered the fact that Congress very obviously created the distinction between the 18 U.S.C. 371 conspiracy and the Title 21 [U.S.C.] 846 conspiracy, and I think they simply haven't noted the difference. The exception is noted, but Instruction 22 will stand. Are there any other exceptions to the instructions that I propose to give?

MR. MURTAGH: No, Your Honor.

MS. LOEFFLER: No, Your Honor.

THE COURT: And any exceptions, Mr. Murtagh, to—I'm not sure there were any defense-requested instructions. But anything that I am not instructing on that you think I should be instructing on?

MR. MURTAGH. No, sir.

THE COURT: Okay. Thank you. We're ready now for closing arguments. Would you call the jury in?

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CR 90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

RESHAT SHABANI, DEFENDANT

JURY INSTRUCTION NO. 22

The defendant is charged in the indictment with conspiring to distribute cocaine in violation of Title 21, United States Code, Section 846. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, there was an agreement between two or more persons to distribute cocaine in violation of 21 U.S.C. § 841(a)(1); and

Second: the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

A conspiracy is a kind of criminal partnership—an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by knowingly participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who knowingly joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, or merely by knowing of the existence of a conspiracy.

Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case Number: A90-063CR

UNITED STATES OF AMERICA

v.

RESHAT SHABANI A/K/A
LEE SHABANI, DEFENDANT

[Filed June 5, 1991]

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After Nov. 1, 1987)

George C. Howard
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[X] was found guilty on count I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	CONSPIRACY	March 7, 1990	I

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count I, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 574-72-2888

Defendant's Date of Birth: February 16, 1992

June 5, 1991
Date of Imposition of Sentence

Defendant's Mailing Address:

Cook Inlet Pretrial Facility
1300 East 4th Ave.
Anchorage, AK 99501

[signature illegible]
Signature of Judicial Officer

H. RUSSEL HOLLAND, U.S.DISTRICT JU
Name & Title of Judicial Officer

Defendant's Residence Address:

SAME AS ABOVE 6/5/91

Date

[Page 2 of 3] IMPRISONMENT

The defendant is hereby committed to the custody of the United states Bureau of Prisons to be imprisoned for a term of 160 months, with credit for time served [to be allowed] [initial illegible].

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

[ ] at _____ a.m. p.m. on _____.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

[Page 2 of 3] RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

United States Marshal

By _____

Deputy Marshal

[Page 3 of 3] SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 months UNLESS DEPORTED.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is

released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of the supervised release.

[X] The defendant shall not possess a firearm or destructive device.

(1) Defendant shall submit to urinalysis testing, and substance abuse counseling as directed by the Probation Office.

(2) Defendant shall submit financial statements as directed by the Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation

officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

cc: J. Bottini, G. Howard, J. Gibbons, R. Shabani, US Marshal, Probation Office, Magistrate Judge Branson, Carmen

SUPREME COURT OF THE UNITED STATES

No. 93-981

UNITED STATES, PETITIONER

v.

RESHAT SHABANI

ORDER ALLOWING CERTIORARI. Filed February 22, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted

February 22, 1994

SUPREME COURT, U.S.
FILED
APR 8 1994
OFFICE OF THE CLERK

No. 93-981

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 993 F.2d 1419.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1993. A petition for rehearing was denied on September 22, 1993. Pet. App. 10a. The petition for a writ of certiorari was filed on December 21, 1993, and was granted on February 22, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(emphasis added). In reaching the conclusion that conspiracy prosecutions fell within an exception to the holding of *Grady*, the *Felix* Court necessarily determined that section 846 requires an overt act as an essential element.

B. A review of the historical development of conspiracy law also favors the view that section 846 should be interpreted as requiring proof of an overt act. The original statutory provisions punishing conspiracy in the thirteenth through fifteenth centuries required proof of an overt act. Although dicta in subsequent cases purported to allow conviction without proof of an overt act, in practice overt acts were pled in indictments or given to defendants in bills of particulars as a matter of right. To the extent that the English common law condoned conspiracy prosecutions without proof of overt acts, this Court stated early on that such indictments have "not met with the approval of the courts in this country." *Bannon and Mulkey v. United States,* 156 U.S. 464, 468-469 (1895). Thus, the prevailing view at the time that Congress passed the general conspiracy statute (now codified at 18 U.S.C. § 371) was that proof of an overt act was an element of a conspiracy prosecution. That being so, the use of the word "conspiracy" should also indicate an overt act element, at least without express language to the contrary.

Concededly, two decisions of this Court have interpreted two statutes lacking explicit overt act requirements as not requiring proof of an overt act. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). These decisions, however, were part of an expansion of the reach of conspiracy law which has subsequently been criticized by this Court and by commentators. Thus, the continued validity of their holdings is subject to question. Moreover, it was against this background of favoring limits on the scope of conspiracy prosecutions, that Congress

enacted section 846. Section 846 therefore should be interpreted as requiring proof of an overt act.

C. Other principles of policy and statutory construction weigh in favor of finding an overt act requirement in section 846. First, without an overt act requirement, conspiracy threatens the venerable principle that a person cannot be punished for his or her thoughts alone. This Court should interpret section 846 as requiring an overt act in order to avoid violating this sound principle of criminal responsibility. Second, the numerous federal conspiracy statutes which overwhelmingly include explicit overt act requirements should be interpreted *in pari materia*; thus, this Court should find an overt act requirement in section 846 as well. Third, this Court should apply the lenity principle in construction of penal statutes demarcating where criminal liability begins in the area of conspiracy law; where doubt exists, the line of liability must be drawn at the point at which one of the conspirators does an overt act.

ARGUMENT

I.

IN *UNITED STATES v. FELIX*, THIS COURT CONCLUDED THAT AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A CONSPIRACY UNDER 21 U.S.C. 846.

In the recent case of *United States v. Felix*, ____ U.S. ____, 118 L.Ed.2d 25 (1992), this Court had occasion to consider the drug conspiracy statute at issue in this case, 21 U.S.C. § 846. In *Felix,* the defendant had been charged with and convicted of a drug conspiracy under section 846. In that prosecution, two of the nine overt acts alleged as supporting the conspiracy were based upon conduct for which Felix had already been prosecuted. Felix thus contended that the conspiracy prosecution violated the Double

Jeopardy Clause. *Felix*, 118 L.Ed.2d at 30-31; *see* U.S. Const. Amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

In particular, Felix relied upon this Court's holding two years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990). Felix pointed to this Court's statement in *Grady*, "that the Double Jeopardy Clause bars a prosecution where the Government, 'to establish *an essential element of an offense* charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.' " *Felix*, 118 L.Ed.2d at 35, quoting *Grady*, 495 U.S. at 521 (emphasis added). This Court was not persuaded by Felix's argument, and stated "[t]aken out of context, and read literally, this language supports the defense of double jeopardy. But we decline to read the language so expansively. . . ." *Felix*, 118 L.Ed.2d at 35.

This statement by the *Felix* Court constitutes a determination that an overt act is "an essential element of [the] offense" of federal drug conspiracy under section 846. If the federal drug conspiracy statute did not require proof of an overt act, this Court would not have found it necessary to reach the issue raised by Felix. Without an overt act requirement, the acts relied on in prosecuting Felix would not have been "essential elements" of the offense, and thus *Grady* would have been easily distinguished. Although interpretation of the drug conspiracy statute was not the Court's "immediate concern" in *Felix*, the Court's reading of the statute was nonetheless "necessary for, and integral to" its conclusion; thus, it cannot be dismissed as "merely dictum." *See California v. Federal Energy Regulatory Comm.*, 495 U.S. 490, 500-501 (1989) (rejecting petitioner's attempt to characterize statutory interpretation by the Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152 (1946) as "merely dictum").

The question of whether the drug conspiracy statute required an overt act clearly arose in *Felix*. It was addressed by the dissenting judge in the lower court's ruling. *United States v. Felix*, 926 F.2d 1522, 1536 (10th Cir. 1991) (Anderson, J., dissenting). Moreover, two justices of this Court explicitly begged to differ with this Court's holding regarding the double jeopardy implications of prosecutions for conspiracies and overt acts in the context of section 846. Justices Stevens and Blackmun argued that it was unnecessary to reach the question of whether *Grady* applied to the situation in which a federal drug conspiracy case charges an overt act for which a defendant was previously prosecuted. Quoting from the dissenting judge in the Circuit Court, they argued that

> "the overt acts at issue here did not meaningfully 'establish' an essential element of the conspiracy" because there is no overt act requirement in the federal drug conspiracy statute and the overt acts did not establish an agreement between Felix and his coconspirators.

Felix, 118 L.Ed.2d at 38 (Stevens, J. with whom Blackmun, J. joined, concurring in judgment). The majority, however, rejected this reasoning, and in thus deciding the question of whether *Grady's* essential element test applied, necessarily concluded that section 846 requires as an essential element proof of an overt act.

This conclusion should not lightly be tossed aside in the case at bar. This case is a question of statutory interpretation. As this Court has stated,

> [a]dherence to precedence is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legisla-

> tive power is implicated, and Congress remains free to alter what we have done.

California v. FERC, 495 U.S. at 499, quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Unlike this Court's cases relied upon by the government which interpret similar statutes, *Felix* is the *only* case in which this Court has interpreted section 846. The numerous lower court cases cited by the government all precede *Felix*, and thus their continued persuasiveness is questionable. Thus, this Court must follow this precedent and hold in no uncertain terms that section 846 requires proof of an overt act.

Moreover, any retreat from this interpretation would undercut other aspects of the *Felix* holding and subject this Court's double jeopardy jurisprudence to question once more. As first noted in *Felix*, this Court found some difficulty applying *Grady's* double jeopardy holding in practice, particularly in the conspiracy context. Subsequently, this Court felt it necessary to overrule *Grady* and return to the double jeopardy test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See United States v. Dixon*, ____ U.S. ____, 125 L.Ed.2d 556, 572-573 (1993).[1] In order for this Court to now hold that the federal drug conspiracy law requires no overt act, this Court would have to dismiss as dicta its purported holding in *Felix*; that "holding" would be reduced to the conditional, "if the statute required proof of an overt act, then it would not have violated the Double Jeopardy Clause to prosecute defendant for the conspiracy after having prosecuted him for the overt acts." For good reason, this Court has elsewhere declined to

[1] The overruling of *Grady* on other grounds does not affect Shabani's analysis of the opinion in *Felix*.

engage in such advisory opinions.[2] This Court should thus refrain from rendering its *Felix* opinion an advisory one which would add confusion to this Court's double jeopardy jurisprudence. Rather than undercutting *Felix*'s holding, this Court should re-affirm *Felix*'s integral premise and hold that section 846 requires proof of an overt act.

II.

A HISTORICAL REVIEW OF CONSPIRACY LAW SUPPORTS THE INTERPRETATION THAT AN OVERT ACT IS REQUIRED BY SECTION 846

As will be demonstrated below, the development of the modern crime of conspiracy indicates that an overt act is required by section 846. First, overt acts were originally elements of conspiracy prosecutions, and remained so in practice up to Congress' passage of the first federal conspiracy statute. Second, the narcotics conspiracy law in question was originally passed against the background of significant cautions against extending the scope of conspiracy prosecutions.

[2] As this Court stated in *United States v. Freuhauf*, 365 U.S. 146 (1961):

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocussed because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.

Id. at 157.

A. THE ORIGINS AND PRACTICE OF CONSPIRACY PROSECUTIONS DEMONSTRATE THAT OVERT ACTS WERE NORMALLY CHARGED IN CONSPIRACY PROSECUTIONS AS ELEMENTS OR AS COMMON PRACTICE

The government argues that by omitting an explicit overt act requirement in section 846, Congress intended to punish conspiracy on the "common law footing," that is, without requiring proof of an overt act. Appellant's Opening Brief at 11. The government relies on this Court's pronouncement that "where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States v. Turley*, 352 U.S. 407, 411 (1957).

A review of the development of conspiracy law, however, supports defendant's interpretation that an overt act is an element of conspiracy. An overt act was originally a requirement of a conspiracy prosecution, and in later practice an overt act was usually identified.

The crime of conspiracy first emerged from the enactment of three statutes in the early fourteenth century, the third of which was known as the *Ordinancio de Conspiratoribus* (33 Edward I). It established a writ of conspiracy to punish early abuses of the criminal process by providing an action against combinations for procuring false and malicious promotions of indictments and pleas, somewhat akin to the modern tort of malicious prosecution. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394 (1922) [hereinafter "Sayre"]; *see* Wright, *The Law of Criminal Conspiracies* 12-15 (1887) [hereinafter "Wright"] ; Harno, *Intent In Criminal Conspiracy*, 89 U. Pa. L. Rev. 624, 624-625 (1941) [hereinafter "Harno"]; Goldstein, *Conspiracy To Defraud The United States*, 68

Yale L.J. 405, 415-416 (1958) [hereinafter "Goldstein"].[3] In the early conspiracy statutes, the crime of conspiracy was not complete without some overt act. As Bracton stated in the thirteenth century: "[n]or ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Bracton, *De Legibus et Consuetudinibus Angliae* (Twiss Ed.), Vol. 2, 335-337, quoted in Bryan, *The Development of The English Law of Conspiracy* 14 (1909) [hereinafter "Bryan"]. This rule lingered for several centuries. In 1486, the preamble to a statute making it a felony to conspire to destroy the King declared that

> by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord, etc. . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.

3 Henry VII, C. 14, quoted in Bryan at 14-15.

The expansions of the application of the writ of conspiracy began in the Court of Star Chamber. Originally, a writ of conspiracy would lie only if a person were acquitted of the charges brought. In the landmark *Poulterers' Case*, however, Lord Coke first declared in dictum that a writ of conspiracy would lie "although nothing be put in execution." *Poulterers' Case*, 9 Co. Rep. 55b, 56b, 77 Eng. Rep. 813, 814 (Ct. of Star Ch. 1611). From this dictum sprang a series of cases

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[3] Several commentators, it should be noted, have questioned whether conspiracy is, strictly speaking, a common law crime. *See* Sayre, 35 Harv. L. Rev. at 396; *see* Wright, at 12-15 (1887) (listing seven reasons that establish nearly conclusively "that the crime of conspiracy was created by statute, and that no such crime was known to the 'common law' "); Harno, 89 U. Pa. L. Rev. at 624-625.

Although the writ of conspiracy was expanded beyond its original form in the centuries that followed, even in its modern incarnation it is traceable to the Edwardian statutes.

reiterating that principle which culminated in Lord Holt's statement that "the very assembling together was an overt act." *Reg. v. Bass*, 11 Mod. 55, 88 Eng. Rep. 881, 882 (1705). Subsequent cases stated that conspiracy was the gist of the crime, and that no overt act need be proven. *See, e.g., Rex v. Gill*, 2 B. & Ald. 204, 106 Eng. Rep. 341 (1818). At the same time, however, some judges doubted "whether, without an overt act, the conspiracy itself amounts to any crime." *Rex v. Seward*, 3 M. & M. 557, 563 (1834) (Williams, J.).

Moreover, although it was stated that the agreement and assembling together was the only overt act that need be proven, it was rare that this principle was actually applied. The general practice rather was to charge in the indictment that a person had done an act "*per conspirationem inter eos habitam*;" the conspiracy itself was a matter of aggravation. Bryan at 75. In later practice, prosecutors were compelled, upon request of the defendants, to furnish bills of particulars giving more specific information in respect to the charges to be repelled. Bryan at 82; 3 Chitty, *The Criminal Law* 1145 (5th Am. ed. 1847); Note, *Developments in the Law — Conspiracy*, 72 Harv. L. Rev. 920, 947 (1959) [hereinafter "Note, *Developments*"]. Case law confirmed that defendants were to be supplied with bills of particulars as a matter of right. *Reg. v. Rycroft*, 6 Cox. C.C. 76 (1852); *Reg. v. Stapylton*, 8 Cox. C. C. 69 (1857). *See* Bryan at 83.

Furthermore, to the extent that general indictments without overt acts were allowed in English courts, this country broke from that practice. As this Court noted in an early case on conspiracy, "the general form of indictment" without alleging overt acts "has not met with the approval of the courts in this country, and in most of the States an overt act must be alleged." *Bannon and Mulkey v. United States*, 156 U.S. 464, 468-469 (1895). Thus, despite broad dicta in case law suggesting that overt acts need not be alleged or proven

in conspiracy cases, there is substantial support for the view that in the mid-nineteenth century overt acts were part and parcel of conspiracy indictments.

It was against this backdrop, furthermore, that Congress first legislated in the area of conspiracy. Congress explicitly included an overt act requirement in the federal general conspiracy law. 18 U.S.C. § 371. But the inclusion of the overt act requirement was not accompanied by any explanation of the function it was to serve. The first such law was enacted as part of a revenue statute entitled "An Act To Amend Existing Laws Relating to Internal Revenue, and for Other Purposes." Ch 169, 14 Stat. 471, 484 (1867); *see generally* Note, *Developments*, 72 Harv. L. Rev. at 946 & n. 176. The original act had not contained a conspiracy section. The amendments added the conspiracy section, but the debates as recorded in the Congressional Globe give no reason for including the overt act requirement. *See* Note, *Developments*, 72 Harv. L. Rev. at 946 n. 176. Subsequent codifications and revisions were made with little attention given to the overt act requirement. *Id.* Thus, the inclusion of an overt act element in this early statute, one commentator has suggested, "represented merely a legislative interpretation of what was necessary to prove a conspiracy at common law." *Id.* at 946-947. This suggests that, should this Court seek guidance from the "common law" definition of conspiracy, this Court would include an overt act requirement in section 846.

B. AFTER A PERIOD OF UNWARRANTED EXTENSION OF THE REACH OF CONSPIRACY LAW, THIS COURT'S WARNINGS AGAINST EXPANDING THE SCOPE OF CONSPIRACY PROSECUTIONS INDICATE THAT AN OVERT ACT IS A NECESSARY ELEMENT OF SECTION 846

The government points to two cases in which this Court held that an overt act was not an element of a statutory conspiracy charge. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). Those cases, however, represent two decisions in an historical expansion of conspiracy prosecutions which have subsequently provoked strong cautionary language from this Court and from commentators. Thus, their continued persuasiveness is suspect. Since the narcotic conspiracy statute at question was passed in the wake of this criticism, this Court should interpret the statute to require an overt act.

1. The Expansion Of The Definition Of Conspiracy.

As noted above, the Court of Star Chamber in the early seventeenth century extended the concept of conspiracy law well beyond its original statutory purpose. The Star Chamber took it upon itself to punish all "errors creeping into the Commonwealth." Hudson, *A Treatise on the Court of Star Chamber* 2 Hargrave, *Collectianea Juridica* 107 (1792), quoted in Harno, 89 U. Pa. L. Rev. at 626-627. Suspicious of any private groupings which might pose a threat to the common good, it found its means of control in conspiracy law.

This attitude and expansion was continued in the King's Bench as courts found more and more types of agreements subject to prosecution for conspiracy. These cases evolved piecemeal based upon loose dicta in prior cases. In 1716, in *Pleas of the Crown*, Hawkins first suggested that conspiracies reached agreements to commit acts that were not themselves criminal, stating "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." Hawkins, *Pleas of the Crown*, Bk. I, C. 72, § 2, 348 (6 ed.), quoted in Sayre, 35 Harv. L. Rev. at 402. This definition was based on questionable authority. *See* Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 344 (1947) [hereinafter "Pollack"]; Sayre at 402; Wright at 70, n. 10. Nonetheless, it was seized upon by the courts and developed until Lord Denman refined it with his "antithesis" stating that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means." *Rex v. Jones*, 4 B. & Ad. 345, 349, 110 Eng. Rep. 485, 487 (1832). *See* Sayre, 35 Harv. L. Rev. at 402-404. Lord Denman later repudiated this definition. *Reg. v. Peck*, 9 Ad. & E. 686, 690, 112 Eng. Rep. 1372, 1373 (1839). Notwithstanding the repudiation, "it came to be considered as a sacred and final dispensation of the law." Sayre, 35 Harv. L. Rev. at 405. It was essentially repeated by this Court in *Pettibone v. United States*, 148 U.S. 197 (1893):

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

Id. at 203.

This definition, however, left to judges a tremendous range of discretion to create crimes. As one court summarized,

> The unsettled state of the law of conspiracy has arisen . . . from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established

> principle. . . . There is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence.

Commonwealth v. Carlisle, Brightly's Reports 36, 38 (Pa. 1821). In practice, "the law of conspiracy became an economic and political weapon, used against a rising labor movement and against groups threatening the *status quo* in many other areas of society." Goldstein, 68 Yale L.J. at 416; *see* Sayre, 35 Harv. L. Rev. at 413-416; Digby, *The Law of Criminal Conspiracy in England and Ireland*, 6 L.Q. Rev. 129, 134-143 (1890). The nebulous definition of conspiracy allowed courts in this country to punish combinations of employees to strike for higher wages. *The Philadelphia Cordwainers Case*(1806).[4] At the same time, the definition retained enough flexibility for courts to hold that combinations of employers banded together to depress wages were not criminal. *Carlisle*, Brightly's Reports 36. It was also used in this country to suppress political association and speech. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919). In the anti-trust context, moreover, this Court went so far as to dispense even with the requirement that there be an agreement, despite the oft-repeated statement that an agreement was the gist of conspiracy law. *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part or the conspirators . . .").

2. *Nash* And *Singer*.

In the midst of this unchecked expansion of conspiracy law, this Court first considered a conspiracy statute without

[4] This case was apparently printed in pamphlet form. It was reprinted in full in 3 Commons and Gilmore, *Documentary History of American Industrial Society* 59-248. *See* Sayre, 35 Harv. L. Rev. at 414.

an explicit overt act requirement. *Nash* was an anti-trust case which reversed convictions under the Sherman Anti-Trust Act for instructional error. 229 U.S. 373. By way of dictum, the Court also addressed other challenges to the prosecution. As in *Masonite Corp.*, the *Nash* Court continued to interpret anti-trust law broadly. The Court tossed aside an objection that the Act's proscriptions were so vague that "a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." 229 U.S. at 376. The Court found no difficulty with the potential under the Act that "a man's fate depends on his estimating rightly." *Id.* at 377. Furthermore, this Court continued to hold that conspiracy law could punish agreements to commit acts that "would not have constituted an offence if they had been done." *Id.* at 378. Finally, also in dicta, the Court addressed whether the Act required proof of an overt act. In keeping with the policy of expanding the reach of anti-trust law, this Court held that no such act was required.

This Court next faced the task of construing a conspiracy statute with no explicit overt act requirement in *Singer*. Although the case construed a statute prohibiting conspiracy to avoid the draft rather than an anti-trust conspiracy, this Court felt confined by its holding in *Nash* to extend the reach of conspiracy law outside the anti-trust context. Thus, this Court held that under this statute, the prosecution need not prove an overt act. *Singer*, 323 U.S. at 340.

3. Retreat From Expansive Interpretations Of Conspiracy Law.

Soon after this Court's decision in *Singer*, however, Justice Frankfurter, writing for himself and Justice Jackson,

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vs.

RESHAT SHABANI,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

A. In *United States v. Felix*, ___ U.S. ___, 118 L.Ed.2d 25 (1992), this Court interpreted 21 U.S.C. § 846 in the double jeopardy context. That case involved the double jeopardy implications of a prosecution for conspiracy after a prior prosecution for an act alleged to have been done in furtherance of that conspiracy. In ruling on the question, this Court considered whether the conspiracy prosecution fell within the prohibition against double jeopardy where the Government, "to establish *an essential element of an offense* charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady v. Corbin*, 495 U.S. 508, 521 (1990)

(emphasis added). In reaching the conclusion that conspiracy prosecutions fell within an exception to the holding of *Grady*, the *Felix* Court necessarily determined that section 846 requires an overt act as an essential element.

B. A review of the historical development of conspiracy law also favors the view that section 846 should be interpreted as requiring proof of an overt act. The original statutory provisions punishing conspiracy in the thirteenth through fifteenth centuries required proof of an overt act. Although dicta in subsequent cases purported to allow conviction without proof of an overt act, in practice overt acts were pled in indictments or given to defendants in bills of particulars as a matter of right. To the extent that the English common law condoned conspiracy prosecutions without proof of overt acts, this Court stated early on that such indictments have "not met with the approval of the courts in this country." *Bannon and Mulkey v. United States,* 156 U.S. 464, 468-469 (1895). Thus, the prevailing view at the time that Congress passed the general conspiracy statute (now codified at 18 U.S.C. § 371) was that proof of an overt act was an element of a conspiracy prosecution. That being so, the use of the word "conspiracy" should also indicate an overt act element, at least without express language to the contrary.

Concededly, two decisions of this Court have interpreted two statutes lacking explicit overt act requirements as not requiring proof of an overt act. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). These decisions, however, were part of an expansion of the reach of conspiracy law which has subsequently been criticized by this Court and by commentators. Thus, the continued validity of their holdings is subject to question. Moreover, it was against this background of favoring limits on the scope of conspiracy prosecutions, that Congress

enacted section 846. Section 846 therefore should be interpreted as requiring proof of an overt act.

C. Other principles of policy and statutory construction weigh in favor of finding an overt act requirement in section 846. First, without an overt act requirement, conspiracy threatens the venerable principle that a person cannot be punished for his or her thoughts alone. This Court should interpret section 846 as requiring an overt act in order to avoid violating this sound principle of criminal responsibility. Second, the numerous federal conspiracy statutes which overwhelmingly include explicit overt act requirements should be interpreted *in pari materia*; thus, this Court should find an overt act requirement in section 846 as well. Third, this Court should apply the lenity principle in construction of penal statutes demarcating where criminal liability begins in the area of conspiracy law; where doubt exists, the line of liability must be drawn at the point at which one of the conspirators does an overt act.

ARGUMENT

I.

IN *UNITED STATES v. FELIX*, THIS COURT CONCLUDED THAT AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A CONSPIRACY UNDER 21 U.S.C. 846.

In the recent case of *United States v. Felix*, ____ U.S. ____, 118 L.Ed.2d 25 (1992), this Court had occasion to consider the drug conspiracy statute at issue in this case, 21 U.S.C. § 846. In *Felix*, the defendant had been charged with and convicted of a drug conspiracy under section 846. In that prosecution, two of the nine overt acts alleged as supporting the conspiracy were based upon conduct for which Felix had already been prosecuted. Felix thus contended that the conspiracy prosecution violated the Double

Jeopardy Clause. *Felix*, 118 L.Ed.2d at 30-31; *see* U.S. Const. Amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

In particular, Felix relied upon this Court's holding two years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990). Felix pointed to this Court's statement in *Grady*, "that the Double Jeopardy Clause bars a prosecution where the Government, 'to establish *an essential element of an offense* charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.' " *Felix*, 118 L.Ed.2d at 35, quoting *Grady*, 495 U.S. at 521 (emphasis added). This Court was not persuaded by Felix's argument, and stated "[t]aken out of context, and read literally, this language supports the defense of double jeopardy. But we decline to read the language so expansively. . . ." *Felix*, 118 L.Ed.2d at 35.

This statement by the *Felix* Court constitutes a determination that an overt act is "an essential element of [the] offense" of federal drug conspiracy under section 846. If the federal drug conspiracy statute did not require proof of an overt act, this Court would not have found it necessary to reach the issue raised by Felix. Without an overt act requirement, the acts relied on in prosecuting Felix would not have been "essential elements" of the offense, and thus *Grady* would have been easily distinguished. Although interpretation of the drug conspiracy statute was not the Court's "immediate concern" in *Felix*, the Court's reading of the statute was nonetheless "necessary for, and integral to" its conclusion; thus, it cannot be dismissed as "merely dictum." *See California v. Federal Energy Regulatory Comm.*, 495 U.S. 490, 500-501 (1989) (rejecting petitioner's attempt to characterize statutory interpretation by the Court in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152 (1946) as "merely dictum").

The question of whether the drug conspiracy statute required an overt act clearly arose in *Felix*. It was addressed by the dissenting judge in the lower court's ruling. *United States v. Felix*, 926 F.2d 1522, 1536 (10th Cir. 1991) (Anderson, J., dissenting). Moreover, two justices of this Court explicitly begged to differ with this Court's holding regarding the double jeopardy implications of prosecutions for conspiracies and overt acts in the context of section 846. Justices Stevens and Blackmun argued that it was unnecessary to reach the question of whether *Grady* applied to the situation in which a federal drug conspiracy case charges an overt act for which a defendant was previously prosecuted. Quoting from the dissenting judge in the Circuit Court, they argued that

> "the overt acts at issue here did not meaningfully 'establish' an essential element of the conspiracy" because there is no overt act requirement in the federal drug conspiracy statute and the overt acts did not establish an agreement between Felix and his coconspirators.

Felix, 118 L.Ed.2d at 38 (Stevens, J. with whom Blackmun, J. joined, concurring in judgment). The majority, however, rejected this reasoning, and in thus deciding the question of whether *Grady's* essential element test applied, necessarily concluded that section 846 requires as an essential element proof of an overt act.

This conclusion should not lightly be tossed aside in the case at bar. This case is a question of statutory interpretation. As this Court has stated,

> [a]dherence to precedence is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legisla-

> tive power is implicated, and Congress remains free to alter what we have done.

California v. FERC, 495 U.S. at 499, quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Unlike this Court's cases relied upon by the government which interpret similar statutes, *Felix* is the *only* case in which this Court has interpreted section 846. The numerous lower court cases cited by the government all precede *Felix*, and thus their continued persuasiveness is questionable. Thus, this Court must follow this precedent and hold in no uncertain terms that section 846 requires proof of an overt act.

Moreover, any retreat from this interpretation would undercut other aspects of the *Felix* holding and subject this Court's double jeopardy jurisprudence to question once more. As first noted in *Felix*, this Court found some difficulty applying *Grady's* double jeopardy holding in practice, particularly in the conspiracy context. Subsequently, this Court felt it necessary to overrule *Grady* and return to the double jeopardy test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See United States v. Dixon*, ____ U.S. ____, 125 L.Ed.2d 556, 572-573 (1993).[1] In order for this Court to now hold that the federal drug conspiracy law requires no overt act, this Court would have to dismiss as dicta its purported holding in *Felix*; that "holding" would be reduced to the conditional, "if the statute required proof of an overt act, then it would not have violated the Double Jeopardy Clause to prosecute defendant for the conspiracy after having prosecuted him for the overt acts." For good reason, this Court has elsewhere declined to

[1] The overruling of *Grady* on other grounds does not affect Shabani's analysis of the opinion in *Felix*.

engage in such advisory opinions.[2] This Court should thus refrain from rendering its *Felix* opinion an advisory one which would add confusion to this Court's double jeopardy jurisprudence. Rather than undercutting *Felix*'s holding, this Court should re-affirm *Felix*'s integral premise and hold that section 846 requires proof of an overt act.

II.

A HISTORICAL REVIEW OF CONSPIRACY LAW SUPPORTS THE INTERPRETATION THAT AN OVERT ACT IS REQUIRED BY SECTION 846

As will be demonstrated below, the development of the modern crime of conspiracy indicates that an overt act is required by section 846. First, overt acts were originally elements of conspiracy prosecutions, and remained so in practice up to Congress' passage of the first federal conspiracy statute. Second, the narcotics conspiracy law in question was originally passed against the background of significant cautions against extending the scope of conspiracy prosecutions.

[2] As this Court stated in *United States v. Freuhauf*, 365 U.S. 146 (1961):

> Such opinions, such advance expressions of legal judgment upon issues which remain unfocussed because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give.

Id. at 157.

A. THE ORIGINS AND PRACTICE OF CONSPIRACY PROSECUTIONS DEMONSTRATE THAT OVERT ACTS WERE NORMALLY CHARGED IN CONSPIRACY PROSECUTIONS AS ELEMENTS OR AS COMMON PRACTICE

The government argues that by omitting an explicit overt act requirement in section 846, Congress intended to punish conspiracy on the "common law footing," that is, without requiring proof of an overt act. Appellant's Opening Brief at 11. The government relies on this Court's pronouncement that "where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States v. Turley*, 352 U.S. 407, 411 (1957).

A review of the development of conspiracy law, however, supports defendant's interpretation that an overt act is an element of conspiracy. An overt act was originally a requirement of a conspiracy prosecution, and in later practice an overt act was usually identified.

The crime of conspiracy first emerged from the enactment of three statutes in the early fourteenth century, the third of which was known as the *Ordinancio de Conspiratoribus* (33 Edward I). It established a writ of conspiracy to punish early abuses of the criminal process by providing an action against combinations for procuring false and malicious promotions of indictments and pleas, somewhat akin to the modern tort of malicious prosecution. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394 (1922) [hereinafter "Sayre"]; *see* Wright, *The Law of Criminal Conspiracies* 12-15 (1887) [hereinafter "Wright"] ; Harno, *Intent In Criminal Conspiracy*, 89 U. Pa. L. Rev. 624, 624-625 (1941) [hereinafter "Harno"]; Goldstein, *Conspiracy To Defraud The United States*, 68

Yale L.J. 405, 415-416 (1958) [hereinafter "Goldstein"].[3] In the early conspiracy statutes, the crime of conspiracy was not complete without some overt act. As Bracton stated in the thirteenth century: "[n]or ought precept, conspiracy, precept and counsel to do harm, unless some act follows." Bracton, *De Legibus et Consuetudinibus Angliae* (Twiss Ed.), Vol. 2, 335-337, quoted in Bryan, *The Development of The English Law of Conspiracy* 14 (1909) [hereinafter "Bryan"]. This rule lingered for several centuries. In 1486, the preamble to a statute making it a felony to conspire to destroy the King declared that

> by the law of this land if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies against any Lord, etc. . . . and so great inconveniences might ensue if such ungodly demeanings should not be straitly punished before that actual deed be done.

3 Henry VII, C. 14, quoted in Bryan at 14-15.

The expansions of the application of the writ of conspiracy began in the Court of Star Chamber. Originally, a writ of conspiracy would lie only if a person were acquitted of the charges brought. In the landmark *Poulterers' Case*, however, Lord Coke first declared in dictum that a writ of conspiracy would lie "although nothing be put in execution." *Poulterers' Case*, 9 Co. Rep. 55b, 56b, 77 Eng. Rep. 813, 814 (Ct. of Star Ch. 1611). From this dictum sprang a series of cases

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[3] Several commentators, it should be noted, have questioned whether conspiracy is, strictly speaking, a common law crime. *See* Sayre, 35 Harv. L. Rev. at 396; *see* Wright, at 12-15 (1887) (listing seven reasons that establish nearly conclusively "that the crime of conspiracy was created by statute, and that no such crime was known to the 'common law' "); Harno, 89 U. Pa. L. Rev. at 624-625.

Although the writ of conspiracy was expanded beyond its original form in the centuries that followed, even in its modern incarnation it is traceable to the Edwardian statutes.

reiterating that principle which culminated in Lord Holt's statement that "the very assembling together was an overt act." *Reg. v. Bass*, 11 Mod. 55, 88 Eng. Rep. 881, 882 (1705). Subsequent cases stated that conspiracy was the gist of the crime, and that no overt act need be proven. *See, e.g., Rex v. Gill*, 2 B. & Ald. 204, 106 Eng. Rep. 341 (1818). At the same time, however, some judges doubted "whether, without an overt act, the conspiracy itself amounts to any crime." *Rex v. Seward*, 3 M. & M. 557, 563 (1834) (Williams, J.).

Moreover, although it was stated that the agreement and assembling together was the only overt act that need be proven, it was rare that this principle was actually applied. The general practice rather was to charge in the indictment that a person had done an act "*per conspirationem inter eos habitam*;" the conspiracy itself was a matter of aggravation. Bryan at 75. In later practice, prosecutors were compelled, upon request of the defendants, to furnish bills of particulars giving more specific information in respect to the charges to be repelled. Bryan at 82; 3 Chitty, *The Criminal Law* 1145 (5th Am. ed. 1847); Note, *Developments in the Law — Conspiracy*, 72 Harv. L. Rev. 920, 947 (1959) [hereinafter "Note, *Developments*"]. Case law confirmed that defendants were to be supplied with bills of particulars as a matter of right. *Reg. v. Rycroft*, 6 Cox. C.C. 76 (1852); *Reg. v. Stapylton*, 8 Cox. C. C. 69 (1857). *See* Bryan at 83.

Furthermore, to the extent that general indictments without overt acts were allowed in English courts, this country broke from that practice. As this Court noted in an early case on conspiracy, "the general form of indictment" without alleging overt acts "has not met with the approval of the courts in this country, and in most of the States an overt act must be alleged." *Bannon and Mulkey v. United States*, 156 U.S. 464, 468-469 (1895). Thus, despite broad dicta in case law suggesting that overt acts need not be alleged or proven

in conspiracy cases, there is substantial support for the view that in the mid-nineteenth century overt acts were part and parcel of conspiracy indictments.

It was against this backdrop, furthermore, that Congress first legislated in the area of conspiracy. Congress explicitly included an overt act requirement in the federal general conspiracy law. 18 U.S.C. § 371. But the inclusion of the overt act requirement was not accompanied by any explanation of the function it was to serve. The first such law was enacted as part of a revenue statute entitled "An Act To Amend Existing Laws Relating to Internal Revenue, and for Other Purposes." Ch 169, 14 Stat. 471, 484 (1867); *see generally* Note, *Developments*, 72 Harv. L. Rev. at 946 & n. 176. The original act had not contained a conspiracy section. The amendments added the conspiracy section, but the debates as recorded in the Congressional Globe give no reason for including the overt act requirement. *See* Note, *Developments*, 72 Harv. L. Rev. at 946 n. 176. Subsequent codifications and revisions were made with little attention given to the overt act requirement. *Id.* Thus, the inclusion of an overt act element in this early statute, one commentator has suggested, "represented merely a legislative interpretation of what was necessary to prove a conspiracy at common law." *Id.* at 946-947. This suggests that, should this Court seek guidance from the "common law" definition of conspiracy, this Court would include an overt act requirement in section 846.

B. AFTER A PERIOD OF UNWARRANTED EXTENSION OF THE REACH OF CONSPIRACY LAW, THIS COURT'S WARNINGS AGAINST EXPANDING THE SCOPE OF CONSPIRACY PROSECUTIONS INDICATE THAT AN OVERT ACT IS A NECESSARY ELEMENT OF SECTION 846

The government points to two cases in which this Court held that an overt act was not an element of a statutory conspiracy charge. *Nash v. United States*, 229 U.S. 373 (1913); *Singer v. United States*, 323 U.S. 338 (1945). Those cases, however, represent two decisions in an historical expansion of conspiracy prosecutions which have subsequently provoked strong cautionary language from this Court and from commentators. Thus, their continued persuasiveness is suspect. Since the narcotic conspiracy statute at question was passed in the wake of this criticism, this Court should interpret the statute to require an overt act.

1. The Expansion Of The Definition Of Conspiracy.

As noted above, the Court of Star Chamber in the early seventeenth century extended the concept of conspiracy law well beyond its original statutory purpose. The Star Chamber took it upon itself to punish all "errors creeping into the Commonwealth." Hudson, *A Treatise on the Court of Star Chamber* 2 Hargrave, *Collectianea Juridica* 107 (1792), quoted in Harno, 89 U. Pa. L. Rev. at 626-627. Suspicious of any private groupings which might pose a threat to the common good, it found its means of control in conspiracy law.

This attitude and expansion was continued in the King's Bench as courts found more and more types of agreements subject to prosecution for conspiracy. These cases evolved piecemeal based upon loose dicta in prior cases. In 1716, in *Pleas of the Crown*, Hawkins first suggested that conspiracies reached agreements to commit acts that were not themselves criminal, stating "there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." Hawkins, *Pleas of the Crown*, Bk. I, C. 72, § 2, 348 (6 ed.), quoted in Sayre, 35 Harv. L. Rev. at 402. This definition was based on questionable authority. *See* Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 344 (1947) [hereinafter "Pollack"]; Sayre at 402; Wright at 70, n. 10. Nonetheless, it was seized upon by the courts and developed until Lord Denman refined it with his "antithesis" stating that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means." *Rex v. Jones*, 4 B. & Ad. 345, 349, 110 Eng. Rep. 485, 487 (1832). *See* Sayre, 35 Harv. L. Rev. at 402-404. Lord Denman later repudiated this definition. *Reg. v. Peck*, 9 Ad. & E. 686, 690, 112 Eng. Rep. 1372, 1373 (1839). Notwithstanding the repudiation, "it came to be considered as a sacred and final dispensation of the law." Sayre, 35 Harv. L. Rev. at 405. It was essentially repeated by this Court in *Pettibone v. United States*, 148 U.S. 197 (1893):

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

Id. at 203.

This definition, however, left to judges a tremendous range of discretion to create crimes. As one court summarized,

> The unsettled state of the law of conspiracy has arisen . . . from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established

> principle. . . . There is in the books an unusual want of precision in the terms used to describe the distinctive features of guilt or innocence.

Commonwealth v. Carlisle, Brightly's Reports 36, 38 (Pa. 1821). In practice, "the law of conspiracy became an economic and political weapon, used against a rising labor movement and against groups threatening the *status quo* in many other areas of society." Goldstein, 68 Yale L.J. at 416; *see* Sayre, 35 Harv. L. Rev. at 413-416; Digby, *The Law of Criminal Conspiracy in England and Ireland*, 6 L.Q. Rev. 129, 134-143 (1890). The nebulous definition of conspiracy allowed courts in this country to punish combinations of employees to strike for higher wages. *The Philadelphia Cordwainers Case* (1806).[4] At the same time, the definition retained enough flexibility for courts to hold that combinations of employers banded together to depress wages were not criminal. *Carlisle*, Brightly's Reports 36. It was also used in this country to suppress political association and speech. *See, e.g., Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919). In the anti-trust context, moreover, this Court went so far as to dispense even with the requirement that there be an agreement, despite the oft-repeated statement that an agreement was the gist of conspiracy law. *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part or the conspirators . . .").

2. *Nash* And *Singer*.

In the midst of this unchecked expansion of conspiracy law, this Court first considered a conspiracy statute without

[4] This case was apparently printed in pamphlet form. It was reprinted in full in 3 Commons and Gilmore, *Documentary History of American Industrial Society* 59-248. *See* Sayre, 35 Harv. L. Rev. at 414.

an explicit overt act requirement. *Nash* was an anti-trust case which reversed convictions under the Sherman Anti-Trust Act for instructional error. 229 U.S. 373. By way of dictum, the Court also addressed other challenges to the prosecution. As in *Masonite Corp.*, the *Nash* Court continued to interpret anti-trust law broadly. The Court tossed aside an objection that the Act's proscriptions were so vague that "a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." 229 U.S. at 376. The Court found no difficulty with the potential under the Act that "a man's fate depends on his estimating rightly." *Id.* at 377. Furthermore, this Court continued to hold that conspiracy law could punish agreements to commit acts that "would not have constituted an offence if they had been done." *Id.* at 378. Finally, also in dicta, the Court addressed whether the Act required proof of an overt act. In keeping with the policy of expanding the reach of anti-trust law, this Court held that no such act was required.

This Court next faced the task of construing a conspiracy statute with no explicit overt act requirement in *Singer*. Although the case construed a statute prohibiting conspiracy to avoid the draft rather than an anti-trust conspiracy, this Court felt confined by its holding in *Nash* to extend the reach of conspiracy law outside the anti-trust context. Thus, this Court held that under this statute, the prosecution need not prove an overt act. *Singer*, 323 U.S. at 340.

3. Retreat From Expansive Interpretations Of Conspiracy Law.

Soon after this Court's decision in *Singer*, however, Justice Frankfurter, writing for himself and Justice Jackson,

warned of the dangers inherent in conspiracy prosecutions under the expanded definition of conspiracy.

> The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. [citation omitted] . . . Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses.

Von Moltke v. Gillies, 332 U.S. 708, 727-728 (1948) (concurring opinion). The next term, Justice Jackson, writing for three justices, spoke out even more forcefully against the Court's trend toward enlarging the compass of conspiracy prosecutions. *Krulewitch v. United States*, 336 U.S. 440, 445 (1948) (Jackson, J. concurring in judgment). The history of conspiracy law, Jackson argued, "exemplifies the 'tendency of a principle to expand itself to the limit of its logic.'" *Id.* at 445, quoting Cardozo, *The Nature of the Judicial Process* 51. Justice Jackson noted the inability of courts or scholars to adequately define conspiracy which he deemed "vague" and "chameleon-like." *Krulewitch*, 336 U.S. at 446-447, citing Harno, 89 U. Pa. L. Rev. at 624; Wright, at 11. The nebulous definition came in part from its origins in political combinations threatening the security of the state, which were then grafted onto modern prosecutions of no political significance. *Id.* at 448; *see also id.* at 450 (noting the origins of conspiracy prosecutions in the suspicious inquisitions of the Court of Star Chamber). Moreover, he cautioned that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet

the exigencies of a particular case." *Krulewitch*, 336 U.S. at 449.

In particular, Justice Jackson criticized this Court's proclivity for applying principles developed in the anti-trust context to other conspiracy cases, especially criminal cases. He feared that "[t]he interchangeable use of conspiracy doctrine in civil as well as penal proceedings opens it to the danger, absent in the case of many crimes, that a court having in mind only the civil sanctions will approve lax practices which later are imported into criminal proceedings." *Id.* at 451-452. This disapproval is significant in this case, because the cases upon which the government relies, *Nash* and *Singer*, represented just such an ill-advised expansion of civil principles into criminal conspiracy law.

Six years later, this Court, in a unanimous opinion, cited Justice Jackson's observations with approval in stating that "important considerations of policy" were behind this Court's repeated warnings "that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1956).[5] With this pronouncement, this Court raised Justice Jackson's concurrence to the status of holding and signalled a clear retreat from its earlier cases which had expanded the application of conspiracy law. Thus, this Court threw into question many of its prior holdings, including those cases relied upon by the government here, *Nash* and *Singer*.

This retreat in part followed and in part accompanied significant scholarly criticism of conspiracy prosecutions. In his book, *The Story of My Life* (1934), Clarence Darrow cautioned that our conspiracy laws "have grown apace in the

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[5] Four justices concurred in the opinion of the Court while expressing differences on an unrelated fifth amendment question. *Grunewald v. United States*, 353 U.S. 391, 425 (1957) (Black, J. concurring).

last forty years until today no one's liberty is safe." *Id.* at 64. At the 1948 annual meeting of the New York Bar Association, John Lord O'Brian gave the annual address which warned that "special attention should be given to the sinister developments which have been taking place in broadening the scope of our criminal conspiracy statutes." O'Brian, *Loyalty Tests and Guilt By Association*, 61 Harv. L. Rev. 592, 599 (1948). Perhaps most poignantly, Solomon Klein contrasted the origins of conspiracy doctrine with its modern practice:

> It is indeed ironical that the doctrine of conspiracy, originally designed to prevent abuse of the legal process and to protect the innocent from false and malicious prosecutions, should have become so overgrown and swollen with an excess of power as to threaten the fair administration of justice.

Klein, *Conspiracy — The Prosecutor's Darling*, 24 Brooklyn L. R. 1, 4 (1957) [hereinafter "Klein"].

If the subsequent questions in commentary and decisions of this Court have not already undercut the authority of *Nash* and *Singer*, this Court may take the opportunity to explicitly overrule them on this point. As this Court has often noted, "when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *United States v. Dixon*, ___ U.S. ___, 125 L.Ed.2d at 578; *Payne v. Tennessee*, 501 U.S. ___, ___, 115 L.Ed.2d 720, 737 (1991).

4. Enactment Of The Narcotic Conspiracy Laws.

It was against this background of warnings that Congress enacted the statute at bar. As the government notes, the current drug conspiracy statute, enacted in 1970, descends from a 1951 statute. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 406, 84 Stat. 1265; Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 767

(codified at 21 U.S.C. 174 (Supp. V 1951)). While, as the government states, the legislative history of section 846 evinces no clear intent to include an overt act requirement, it is just as clear that Congress did not clearly state an intent to *exclude* an overt act requirement. Given this Court's trend toward restricting the sweep of conspiracy prosecutions, and the scholarly criticism of conspiracy law, Congress may very well have understood this Court as requiring an overt act unless explicitly stated otherwise. Consonant with this Court's warnings against expanding the sweep of conspiracy prosecutions, this Court should interpret the narcotic conspiracy law in a restrictive manner and hold that Congress implicitly included an overt act requirement when it passed section 846.

III.

OTHER PRINCIPLES OF STATUTORY INTERPRETATION AND POLICY SUGGEST THAT THIS COURT SHOULD INTERPRET SECTION 846 TO INCLUDE AN OVERT ACT REQUIREMENT

A. WITHOUT AN OVERT ACT REQUIREMENT, CONSPIRACY LAW UNLIKE ANY OTHER CRIME, PUNISHES A MENTAL STATE WITHOUT AN *ACTUS REUS*.

It has long been a cardinal principle of Anglo-American jurisprudence that "the imagination of the mind to do wrong, without an act done, is not punishable in our law." *Hales v. Petit*, 1 Plow. 253, 259, 75 Eng. Rep. 387, 397 (C.B. 1562). This is reflected in the venerable maxim *cogitationis penam nemo patitur*. As Blackstone noted,

> to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in *foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of

> it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable-to-punishment.

4 Blackstone, *Commentaries* *21 (emphasis in original). Such a rule is not only founded upon skepticism about our ability to determine mental states, but also of our ability

> to predict whether antisocial behavior will follow from antisocial thoughts. . . . [I]t seeks to assure that the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred by the threat of sanction and that there has been an identifiable occurrence so that multiple prosecution and punishment may be minimized.

Goldstein, *Conspiracy To Defraud The United States*, 68 Yale L.J. 405, 405-406 (1958). As this Court has noted in interpreting other conspiracy statutes, the overt act requirement in a conspiracy prosecution performs just that function. "It affords a *locus penitentiae*, so that before the act done either one or all the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *United States v. Britton*, 108 U.S. 199, 204 (1883); *Bannon and Mulkey v. United States*, 156 U.S. 464, 469 (1895). The overt act demonstrates that the conspiracy is not "a project still resting solely in the minds of the conspirators." *Yates v. United States*, 354 U.S. 298, 334 (1957).

As Justice Jackson noted, without an overt act requirement, the modern crime of conspiracy is "always 'predominantly mental in composition,' because it consists primarily

of a meeting of minds and an intent." *Krulewitch*, 336 U.S. at 447-448, quoting Harno, 89 U. Pa. L. Rev. at 632. *See* Klein, 24 Brooklyn L.Rev. at 7. More than any other crime, conspiracy thus violates the act requirement. Goldstein, 68 Yale L.J. at 406. As was noted in *Lambert v. People*, such conspiracy laws are anomalous in our jurisprudence:

> By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offense of conspiracy is made to consist in the intent; in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of the interchange of agreement. Surely an opportunity for repentance should be allowed to all human beings; and he who has conspired to do a criminal act, should be encouraged to repent and abandon it. Acts and deeds are subjects of human laws; not thoughts and intents, unless accompanied by acts.

Lambert v. People, 9 Cow. 578, n. 625 (N.Y. 1827).

Consistent with venerable maxims of criminal liability, this Court should interpret section 846 as requiring an overt act.

B. SECTION 846 SHOULD BE HARMONIZED WITH THE REST OF CONSPIRACY LAW

In general, statutes *in pari materia* should be construed together. 2B Sutherland, Statutory Construction §§ 51.01 *et. seq.* As this Court has stated,

> [s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970). As the government has pointed out, at least twenty federal conspiracy statutes — the vast majority of such statutes — explicitly require overt acts. As noted above, this overt act requirement reflects a policy of demarcating the line of criminal punishment at the point where the conspiracy is no longer "a project still resting solely in the minds of the conspirators." *Yates*, 354 U.S. at 334. It marks an advance from the anomalous historical practice of punishing thoughts expressed only in agreement. Without a clear manifestation that Congress intended to depart from this principle, this Court should interpret section 846 *in pari materia* with other federal conspiracy statutes and hold that it too contains an overt act element.

C. THE RULE OF LENITY WEIGHS IN FAVOR OF FINDING AN OVERT ACT REQUIREMENT

If the foregoing discussion has left any doubt that an overt act is a requirement of a conspiracy prosecution under section 846, any doubt must be resolved in favor of lenity towards the defendant. *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655, 663 (1994). The rule of lenity requires that " 'fair warning should be given to the world . . . of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' " *United States v. Bass*, 404 U.S. 336, 348 (1971), quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). In the case of conspiracy law, however, the line has moved quite a bit over time. At some points, courts have held that a conspiracy is not punishable until some overt act is performed. At other times courts have purported to punish conspiracies as soon as an agreement was reached regardless of any overt act performed or subsequent abandonment of the objective. As noted above, depending upon their objects, most federal conspiracy statutes clearly require an overt act. In the midst of this ambiguity, Congress passed the narcotics conspiracy statute at bar, without explicitly stating that an overt act was or was not required. Thus, the line which must be crossed before conspiracy is criminal was left blurred. Without an unambiguous statement from Congress that an overt act is not required, this Court should apply the rule of lenity to include an overt act element in section 846.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Dated: June 16, 1994

Respectfully submitted,

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FOR ARGUMENT

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OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-981

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent is incorrect in contending (Resp. Br. 3-7) that the question presented here—whether the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act—has already been answered in *United States* v. *Felix*, 112 S. Ct. 1377 (1992). *Felix* did not address the overt act issue at all, and the *Felix* Court's resolution of the double jeopardy issue before it did not require it to answer the question presented here, either explicitly or implicitly.

The Court in *Felix* held that the Double Jeopardy Clause did not bar the prosecution of Felix for drug conspiracy under Section 846, even though the conspiracy charge against Felix alleged, and the government proved at trial, two overt acts that formed the basis for previously charged substantive drug

offenses. 112 S. Ct. at 1383-1385. The Tenth Circuit had reversed Felix's conspiracy conviction, relying on this Court's statement in *Grady* v. *Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause bars a subsequent prosecution in which the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *United States* v. *Felix*, 926 F.2d 1522, 1527 (1991) (quoting *Grady* v. *Corbin*, 495 U.S. at 521). In reversing the Tenth Circuit's judgment, the Court in *Felix* recognized that the statement in *Grady*, "[t]aken out of context, and read literally, * * * supported [Felix's] defense of double jeopardy." 112 S. Ct. at 1383-1384. The Court refused, however, to read that statement "so expansively." *Id.* at 1384. Instead, it chose "to adhere to the * * * line of cases" establishing "the rule that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes." *Id.* at 1384-1385.

Respondent contends (Resp. Br. 2) that the Court in *Felix* "necessarily determined that section 846 requires [proof of] an overt act as an essential element" when it found that the prosecution of Felix would have been barred under an "expansive[]" reading of *Grady*. *Felix*, 112 S. Ct. at 1383-1384. Respondent reasons that, if an overt act were not an essential element of a Section 846 conspiracy, it could not be said that the government in *Felix* relied on the overt acts alleged in the indictment "to establish an essential element of [the] offense charged in that prosecution." *Grady* v. *Corbin*, 495 U.S. at 521.

Contrary to respondent's claim, it was not necessary for the Court in *Felix* to assume that proof of an overt act is required under Section 846 in order for the Court

to conclude that Felix's prosecution would have been barred under an "expansive[]" reading of *Grady*. *Felix*, 112 S. Ct. at 1383-1384. That is clear from the Tenth Circuit's decision in *Felix*. Although a majority of the Tenth Circuit panel held that Felix's prosecution was barred under *Grady*, it was "mindful that 21 U.S.C. § 846 does not require proof of an overt act in the prosecution of a drug conspiracy." *Felix*, 926 F.2d at 1529 n.7. The panel majority based its holding on the fact that the government had relied on proof of overt acts "to show the criminal agreement for the conspiracy." *Ibid.* Thus, the panel majority reasoned that the prosecution fell within *Grady* not because the overt acts themselves were essential elements of the conspiracy offense, but because they were used as evidence of an essential element: an agreement to violate the drug laws.

In dissenting from the panel majority's holding in *Felix*, Judge Anderson agreed with the majority that "[a]n overt act is *not* a *necessary* element of conspiracy" under Section 846. *Felix*, 926 F.2d at 1536 (internal quotation marks omitted). Furthermore, Judge Anderson found it "arguable" that, as the majority had held, "the two overt acts, while not themselves an essential element, were introduced by the prosecution to *establish* an essential element: the agreement to violate the drug laws." *Ibid.* He concluded, however, that upon "[c]areful scrutiny," the overt acts "did not meaningfully 'establish'" the existence of the agreement, because the "crux" of the conspiracy concerned the establishment of a methamphetamine lab in Beggs, Oklahoma, whereas the overt acts "encompass Felix's illegal activity *after* the government seized the Beggs lab" and did not directly implicate Felix's co-conspirators. *Ibid.*

Before this Court, the parties in *Felix* agreed that Section 846 does not require proof of an overt act. See

90-1599 U.S. Br. 24 ("21 U.S.C. 846 does not require proof of an overt act"); 90-1599 Tr. of Oral Arg. 45 (counsel for respondent agrees that proof of an overt act is "not an essential element of the crime" proscribed in Section 846). No contrary view was expressed in either the Chief Justice's opinion for the Court or Justice Stevens' opinion concurring in part and concurring in the judgment of the Court. Indeed, Justice Stevens stated that "there is no overt act requirement in the federal drug conspiracy statute." 112 S. Ct. at 1386 (Stevens, J., joined by Blackmun, J., concurring in part and concurring in the judgment). Because the Court in *Felix* could conclude, as did both the majority and dissenting judges in the court of appeals, that Felix's prosecution was arguably barred under *Grady* even though Section 846 did not require proof of an overt act, there is no merit to respondent's contention (Resp. Br. 6) that "[i]n order for this Court to now hold that the federal drug conspiracy law requires no overt act, this Court would have to dismiss as dicta its purported holding in *Felix*."[1]

[1] Likewise without merit is respondent's contention (Resp. Br. 6) that *Felix* casts doubt on earlier lower court decisions holding that Section 846 does not require proof of an overt act. Since this Court's decision in *Felix*, numerous courts of appeals have reaffirmed earlier decisions holding that Section 846 does not require proof of an overt act. See, *e.g.*, *United States* v. *Rodgers*, 18 F.3d 1425, 1429 (8th Cir. 1994); *United States* v. *Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993), cert. denied, No. 93-8581 (June 20, 1994); *United States* v. *Price*, 13 F.3d 711, 724 (3d Cir.), cert. denied, 114 S. Ct. 1863 (1994) & Nos. 93-9109, 93-9206 (June 27, 1994), and petition for cert. pending, No. 93-9557 (filed June 9, 1994); *United States* v. *Ivory*, 11 F.3d 1411, 1415 (7th Cir. 1993); *United States* v. *Banks*, 10 F.3d 1044, 1050 (4th Cir. 1993), cert. denied, 114 S. Ct. 1850 (1994) & No. 93-8056 (June 13, 1994); *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993); *United States* v. *Rangel-Arreola*, 991 F.2d 1519, 1522 n.2 (10th Cir. 1993); *United States* v. *Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992).

2. Our primary submission is that Congress's omission of an overt act requirement in Section 846 reflects Congress's intent not to require proof of an overt act under that statute. As we explained in our opening brief (at 8-12), two circumstances compel that conclusion. First, Congress expressly required proof of an overt act in at least 20 current conspiracy statutes, including the general conspiracy statute, 18 U.S.C. 371. The inclusion of an express overt act requirement in so many statutes shows that when Congress intended to require proof of an overt act, it knew how to do so. By the same token, the omission of an express overt act requirement in Section 846 indicates that Congress did not intend to require such proof under that statute.[2] Second, in accordance with a "cardinal rule of statutory construction," *Molzof* v. *United States*, 112 S. Ct. 711, 716 (1992), it must be presumed that Congress intended to adopt the common law rule that proof of an overt act is not required to establish a conspiracy. Nothing in respondent's brief casts doubt on our submission.

[2] See *Custis* v. *United States*, 114 S. Ct. 1732, 1736 (1994) (in light of Congress's inclusion of language in 21 U.S.C. 851(c) expressly authorizing defendants at sentencing to challenge prior convictions used for sentence enhancement, the omission of similar language in 18 U.S.C. 924(e) indicates that Congress did not intend to permit such challenges in sentencing under that provision); *Lukhard* v. *Reed*, 481 U.S. 368, 376 (1987) ("the fact that Congress was silent in the AFDC statute but has elsewhere been explicit when it wished to exclude personal injury awards from income tends to refute rather than support a legislative intent to exclude them from AFDC computations") (opinion of Scalia, J.).

a. Respondent answers our first point with a non sequitur. He argues that Section 846 should be construed to require proof of an overt act, even though it does not expressly require such proof, because many other federal conspiracy statutes do expressly require such proof. Resp. Br. 22. That argument, however, cuts the other way: this Court has made clear that significance should be accorded to Congress's omission of a requirement in one statute that it has expressly included in other statutes. See note 2, *supra*; see also, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Respondent's argument might have some force if Section 846 were the only federal conspiracy statute in which Congress had ever omitted an express overt act requirement, and there were evidence that the omission was inadvertent. The omission of an overt act requirement in Section 846 is far from exceptional, however, and there is no evidence that the omission was inadvertent. Contrary to respondent's assertion that the "vast majority" of other federal conspiracy statutes expressly require proof of an overt act (Resp. Br. 22), most federal conspiracy statutes do not expressly require such proof. See Pet. 14 n.9.

b. Respondent challenges the premise of our second point, arguing that proof of an overt act was required to establish a conspiracy at common law. Resp. Br. 8-11. That challenge is without merit.

First, this Court has consistently recognized that proof of an overt act was not required to establish a conspiracy at common law.[3] The commentators

[3] See *Collins* v. *Hardyman*, 341 U.S. 651, 659 (1951); *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946); *Nash* v. *United States*, 229 U.S. 373, 378 (1913); *Hyde* v. *United States*, 225 U.S. 347, 359 (1912); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905); *Bannon* v. *United States*, 156 U.S. 464, 468 (1895); see also *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *O'Connell* v. *United States*, 253 U.S. 142 (1920).

uniformly agree that no such proof was required to establish a common law conspiracy.[4] None of the sources cited by respondent supports a contrary conclusion.[5]

[4] American Law Institute, *Model Penal Code and Commentaries* § 5.03, cmt. 5, at 452 (1985); J. Bryan, *The Development of the English Law of Conspiracy* 55-65 (1909); H. Carson, *The Law of Criminal Conspiracies and Agreements, As Found in the American Cases* 92-93 (1887); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.5(c), at 93 (1986); R. Wright, *The Law of Criminal Conspiracies and Agreements* 6 (1887); K. David, *The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States*, 25 Vand. J. Transnat'l L. 951, 959 n.48 (1993); A. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 406 n.5 (1959); B. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 338 (1947); F. Sayre, *Criminal Conspiracy*, 35 Harv. L. Rev. 393, 425 (1922); Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 945-946 (1959); see also 4 *Stephen's Commentaries on the Laws of England* 166 (L. Warmington ed., 21st ed. 1950); 8 W. Holdsworth, *A History of English Law* 380 (1926); A. Harno, *Intent in Criminal Conspiracy*, 89 U. Pa. L. Rev. 624, 625 (1941).

[5] Respondent asserts that the crime of conspiracy "first emerged" from three statutes enacted during the reign of King Edward I (First Ordinance of Conspirators (1292), 20 Edw. I; Second Ordinance of Conspirators (1300), 28 Edw. I; and Third Ordinance of Conspirators (1304), 33 Edw. I), and that, under those statutes, proof of an overt act was required to establish a conspiracy. Resp. Br. 8-9. In fact, commentators disagree whether conspiracy was a crime at early common law. Compare, *e.g.*, 2 Coke, *Institutes* 561, 562 (1817) (Ordinance of 33 Edw. I "was but an affirmance of the common law") with 2 W. LaFave & A. Scott, *supra*, § 6.4(a), at 60-61 ("The crime of conspiracy [was] unknown to the early common law."); see also 3 W. Holdsworth, *A History of English Law* 401 (1923) ("Though some writers have thought that [a writ of conspiracy] existed at [early] common law, * * * it [is] very much more probable that it owes its origin to the[] [Edwardian] statutes." (footnote omitted)). The commen-

Moreover, Congress has consistently indicated that it shares this Court's understanding of common law conspiracy. Congress included an express overt act requirement when it enacted the first general conspiracy statute in 1867. See U.S. Br. 9 n.6. By doing so, Congress evinced an intention to "change[] the common law" by "requiring an overt act to be alleged and proved." *Bannon* v. *United States*, 156 U.S. 464, 468 (1895). That intention reflected Congress's understanding that proof of an overt act was not required at common law. Likewise, Congress's subsequent inclusion of an express overt act requirement in some conspiracy statutes, but not in others, demonstrates Congress's understanding that, in the absence of an express overt act requirement in the text of the statutes, those statutes would be construed to punish conspiracies "on the common law footing," *Singer* v. *United States*, 323 U.S. 338, 340

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tators agree, however, that the common law came to recognize an offense of conspiracy that was broader than the types of conspiracy punished under the Edwardian statutes and that did not require proof of an overt act. See J. Bryan, *supra*, at 15; 3 W. Holdsworth, *supra*, at 406 & n.10; R. Wright, *supra*, at 6; Sayre, *supra*, 35 Harv. L. Rev. at 397 n.11. The principle that proof of an overt act was not required to establish a conspiracy at common law was authoritatively established in 1611 by the Court of Star Chamber in *Poulterers' Case*, 9 Co. Rep. 55b. See J. Bryan, *supra*, at 57, 65; 11(1) *Halsbury's Laws of England* ¶ 64, at 59 (4th ed. reissue 1990); R. Wright, *supra*, at 6; Goldstein, *supra*, 68 Yale L.J. at 415-416; Harno, *supra*, 89 U. Pa. L. Rev. at 626; Sayre, *supra*, 35 Harv. L. Rev. at 398; Note, *Developments*, *supra*, 72 Harv. L. Rev. at 923. That principle was thereafter consistently recognized in the United Kingdom and the United States. See, *e.g.*, *Rex* v. *Best*, 6 Mod. 185 (1705); *State* v. *Buchanan*, 5 H. & J. 317 (Md. 1821); see also H. Carson, *supra*, at 100 (*Buchanan* "has always been considered a leading American authority" on common law of conspiracy).

(1945), quoting *Nash* v. *United States*, 229 U.S. 373, 378 (1913), *i.e.*, without requiring proof of an overt act, see, *e.g.*, *Fiswick* v. *United States*, 329 U.S. 211, 216 n.4 (1946).

c. Respondent asserts that "in practice overt acts [have been] pled in indictments or given to defendants in bills of particulars as a matter of right." Resp. Br. 2. That assertion, even if true, is irrelevant. The fact that a prosecutor alleges an overt act in a conspiracy charge does not mean that such an allegation is required by the conspiracy statute on which the charge is based. A prosecutor may allege an overt act to show that venue is proper or to give the defendant notice of the nature of the evidence.[6] Similarly, an overt act may be proved at trial to establish venue[7] or the existence of a conspiratorial agreement.[8] In sum, any practice of alleging an overt act reflects only that most conspiracy prosecutions involve proof of an overt act, regardless whether such proof is required by the underlying conspiracy statute. See Note, *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 947 (1959).

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[6] See 2 W. LaFave & A. Scott, *supra*, § 6.4(a)(2), at 64-65, citing *Hyde* v. *Shine*, 199 U.S. at 76-78; *Model Penal Code*, *supra*, § 5.03, cmt. 5, at 452; Goldstein, *supra*, 68 Yale L.J. at 409 n.11.

[7] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-253 (1940) (although proof of overt act was not required to establish Sherman Act conspiracy, such proof was required to establish that venue was proper, when there was no proof that the agreement was formed in the district in which prosecution was brought).

[8] "[T]he prosecution is seldom able to present direct evidence of the [conspiratorial] agreement," 2 W. LaFave & A. Scott, *supra*, § 6.4(d), at 71, because "[s]ecrecy and concealment are essential features of successful conspiracy," *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947).

3. In *Nash* and *Singer*, this Court construed conspiracy statutes that did not contain express overt act requirements not to require proof of an overt act. See U.S. Br. 15-17. On other occasions, the Court has made clear that proof of an overt act is required under the general conspiracy statute only because such proof is expressly required by the text of that statute. See, *e.g.*, *Fiswick*, 329 U.S. at 216 n.4; see also *United States* v. *Feola*, 420 U.S. 671, 687 (1975). Thus, this Court's decisions "give Congress a formulary: by choosing a text modeled on [the general conspiracy statute], it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1 [at issue in *Nash*], it dispenses with such a requirement." *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 113 S. Ct. 509 (1992).

Respondent claims that the "continued persuasiveness" of *Nash* and *Singer* is "suspect," because they represent "an ill-advised expansion" of criminal conspiracy law. Resp. Br. 12, 17. He also claims that *Nash* and *Singer* subsequently "provoked strong cautionary language from this Court and from commentators." *Id.* at 12. He argues that "[s]ince the narcotic conspiracy statute at question was passed in the wake of this criticism, this Court should interpret the statute to require an overt act." *Ibid.* Respondent's argument is flawed at every step.

First, *Nash* and *Singer* did not expand the scope of criminal conspiracy law. In each case, the Court began with the premise that proof of an overt act was not required to establish a conspiracy at common law, and it then applied the canon of construction that when Congress uses a common law term in a criminal statute and does not define that term, it intends that term to have its common law meaning. See U.S. Br. 15-16. Both

the premise and the canon of construction underlying *Nash* and *Singer* were well established long before those cases were decided. See, *e.g.*, *Bannon*, 156 U.S. at 468; *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 159-160 (1820). *Nash* and *Singer* thus broke no new ground in the field of criminal conspiracy law.

Second, this Court's subsequent decisions do not "thr[o]w" *Nash* and *Singer* "into question," as respondent asserts (Resp. Br. 17). Nothing in any of this Court's decisions suggests that *Nash* and *Singer* are no longer good law. To the contrary, the Court has reaffirmed the premise of *Nash* and *Singer* that proof of an overt act was not required to establish a conspiracy at common law. See *Collins* v. *Hardyman*, 341 U.S. 651, 659 (1951) ("a mere unlawful agreement or conspiracy may be made a federal crime, as it was at common law," citing *Nash*); *Fiswick*, 329 U.S. at 216 n.4, citing *Nash*.[9] One of those decisions, *Collins* v. *Hardyman*, was issued a few months before Congress enacted the first drug conspiracy statute in 1951 without including an express overt act requirement in that statute.[10] Thus, it is

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[9] See also *United States* v. *Howard*, 352 U.S. 212, 216 (1957) (citing *Singer* without suggesting that its continued vitality is in doubt).

[10] Significantly, the opinion for the Court in *Collins* was written by Justice Jackson, who was "no friend of the law of conspiracy," *Iannelli* v. *United States*, 420 U.S. 770, 778 (1975), and who wrote the opinion on which respondent relies most heavily in asserting that later decisions of this Court "threw into question" *Nash* and *Singer*, Resp. Br. 16-17, discussing *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). In another case decided the same Term as *Collins*, Justice Jackson observed that "no overt act is * * * required" under the conspiracy provision of the Smith Act, 18 U.S.C. 11 (1946), and he cited *Nash* as a decision that "upheld the power of Congress to adopt the ancient

fanciful for respondent to suggest that when Congress enacted the predecessor of Section 846, it "may very well have understood this Court as requiring an overt act unless explicitly stated otherwise." Resp. Br. 19.

Finally, regardless of the continuing validity of *Nash* and *Singer*, Section 846 should not be construed to require proof of an overt act. Even if Congress omitted an express overt act requirement from the original drug conspiracy statute in 1951, in the belief that the statute would be construed to require proof of an overt act by implication, Congress could not have held that belief in 1970, when it enacted Section 846. As of 1970, the lower federal courts had consistently interpreted the 1951 statute and a similar statute enacted in 1956 not to require proof of an overt act. See U.S. Br. 13-14. Congress's omission of an express overt act requirement from Section 846 suggests an intention to adopt that interpretation. Cf., *e.g.*, *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2213 (1992); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). That suggestion is reinforced by the fact that just 12 days before Congress enacted Section 846, it enacted another conspiracy statute in which it expressly required proof of an overt act. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 802(a), 84 Stat. 936 (proscribing conspiracy to obstruct enforcement of state laws to facilitate illegal gambling if "one or more of [the conspirators] does any act to effect the object of such a conspiracy") (current version at 18 U.S.C. 1511(a)); see also *Iannelli* v. *United States*, 420 U.S. 770, 788 (1975) (discussing legislative history of Act).

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common law that makes conspiracy itself a crime." *Dennis* v. *United States*, 341 U.S. 494, 574 (1951) (Jackson, J., concurring).

4. Respondent resorts, finally, to two principles of statutory construction, neither of which supports his position.

a. Respondent errs in asserting that "without an overt act requirement, * * * [Section 846] punishes a mental state without an *actus reus*," in contravention of "the venerable maxim *cogitationis penam nemo patitur*," Resp. Br. 19 (*i.e.*, "No one is punished for his thoughts," *Black's Law Dictionary* 259 (6th ed. 1990)). That maxim is not implicated by construing Section 846 not to require proof of an overt act. Even if an overt act need not be proved, the government still must prove an act: the act of agreement. See, *e.g.*, *Nash*, 229 U.S. at 378 (common law "does not make the doing of any act *other than the act of conspiring* a condition of liability") (emphasis added).[11]

b. Respondent also errs in relying on the rule of lenity. Resp. Br. 22-23. "[T]hat venerable rule is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted); see also, *e.g.*, *Callanan* v. *United States*, 364 U.S. 587, 596-597 (1961) (refusing to apply rule of lenity

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[11] See also 11(1) *Halsbury's Laws of England*, *supra*, ¶ 64, at 59 ("The actus reus in a conspiracy is therefore the agreement to execute the unlawful conduct, not the execution of it." (footnotes omitted)); 8 W. Holdsworth, *supra*, at 380 ("there must always have been an overt act of agreement or combination, so that a mere uncommunicated intention to conspire is not a conspiracy"); 2 W. LaFave & A. Scott, *supra*, § 6.4(d), at 70 ("[A]n essential element of every crime is an act (or omission). The crime of conspiracy might appear to be an exception to this general rule * * *. But conspiracy is not an exception, for the agreement itself is the requisite act." (footnote omitted)).

in construing conspiracy provision of Hobbs Act, 18 U.S.C. 1951). This is not such a case. It is clear from the text of Section 846 that proof of an overt act is not required in prosecutions under that statute.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1994